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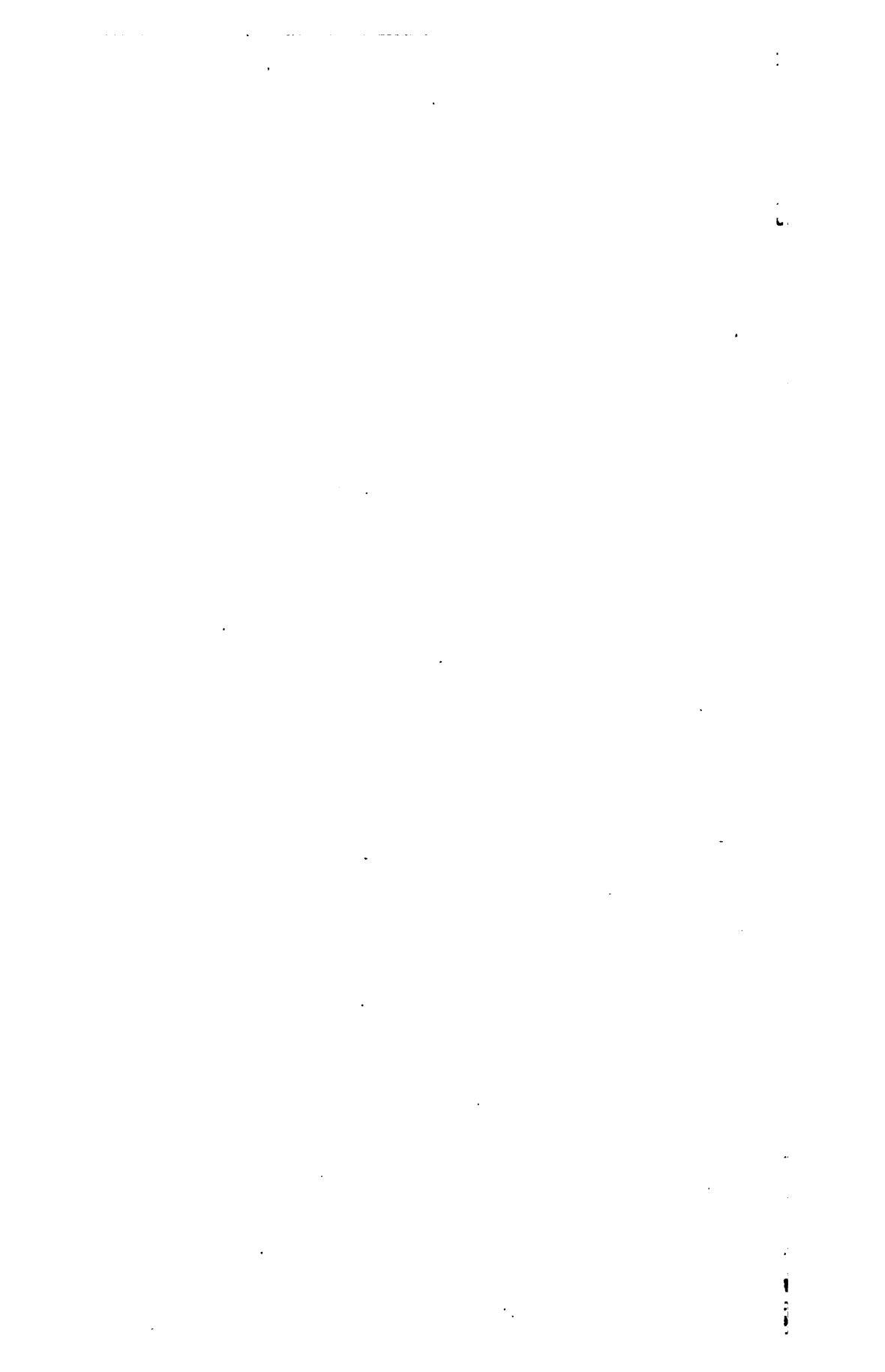
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REPORTS OF CASES

IN

CRIMINAL LAW,

ARGUED AND DETERMINED

IN ALL THE COURTS IN ENGLAND AND IRELAND.

EDITED BY

EDWARD W. COX, Esq., OF THE MIDDLE TEMPLE,

~~Barrister-at-Law.~~

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REPORTS
OF
Criminal Law Cases.

WESTERN CIRCUIT.

DEVONSHIRE SPRING ASSIZES, 1850.

(Before Mr. JUSTICE TALFOURD.)

REG. v. BIRD ET UXOR. (a)

Murder—Evidence—Joint assault.

Prisoners were indicted for the murder of their servant girl by, inter alia, a series of beatings.

The evidence proved a series of beatings within the time charged in the indictment, but it was distinctly proved by the surgeon, that these beatings did not produce or even conduce to her death. The cause of death was proved to be by two blows upon the head, but there was no evidence to show how or by whom they were inflicted, or by which of the prisoners, or by both of them.

Held, that in the absence of any such proof, there was no case for the jury of murder by the said blows in the head, and an acquittal was directed.

ROWE, Q. C., and *Karslake*, were for the prosecution. *Slade* and *E. W. Cox*, for the prisoners.

The prisoners were indicted for the wilful murder of Mary Ann Parsons.

The following is a copy of the indictment:—(b)

DEVONSHIRE, } The jurors for our Lady the Queen, upon their Indictment.
to wit. } oath present, that Robert Courtice Bird, late of the
parish of Buckland Brewer, in the county of Devon, labourer, and Sarah,
the wife of the said Robert Courtice Bird, late of the same parish, not
having the fear of God before their eyes, but being moved and seduced
by the instigation of the devil, on the 5th day of November, in the year
of our Lord 1849, with force and arms, at the parish aforesaid, in the
county aforesaid, in and upon one Mary Ann Parsons, in the peace of
God and our said Lady the Queen then and there being, unlawfully,

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

(b) I have deemed it best to give the Indictment in full, as repeated reference was made to it in the course of the arguments.

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feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Robert Courtice Bird and Sarah his wife, with a certain stick of the value of a penny, which they the said Robert Courtice Bird and Sarah his wife in their right hands then and there had and held, the said Mary Ann Parsons in and upon the head, chest, shoulders, back, arms, legs and thighs of her the said Mary Ann Parsons, then and there feloniously, wilfully, and of their malice aforethought, did strike and beat, they the said Robert Courtice Bird and Sarah his wife giving to the said Mary Ann Parsons then and there, thereby, to wit, with the stick aforesaid, in and upon the head, chest, shoulders, back, arms, legs and thighs of her the said Mary Ann Parsons, divers mortal bruises, of which said mortal bruises the said Mary Ann Parsons, from the said 5th day of November in the year aforesaid, until the 4th day of January in the year of our Lord 1850, at the parish aforesaid, in the county aforesaid, did languish and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish aforesaid, in the county aforesaid, of the said mortal bruises died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Courtice Bird and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid feloniously, wilfully, unlawfully, and of their malice aforethought, did kill and murder, against the peace of our Lady the Queen, her crown and dignity.

Second count.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Courtice Bird, late of the parish of Buckland Brewer, in the county of Devon, and Sarah his wife, late of the same parish, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 5th day of November, in the year of our Lord 1849, and on divers other days and times between that day and the 3rd day of January, in the year of our Lord 1850, to wit, on the 1st day of December, in the year of our Lord 1849, and the 1st day of January, in the year of our Lord 1850, respectively, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one Mary Ann Parsons, in the peace of God and our said Lady the Queen then and there being, feloniously, wilfully, wickedly, unlawfully, and of their malice aforethought, did make divers, to wit, ten assaults; and that the said Robert Courtice Bird and Sarah his wife, with a certain stick, to wit, of the value of one penny, which they the said Robert Courtice Bird and Sarah his wife in their right hands, then and there, to wit, at the several times aforesaid, at the parish aforesaid, in the county aforesaid, had and held, the said Mary Ann Parsons in and upon the head, chest, shoulders, arms, legs and thighs of her the said Mary Ann Parsons, then and there, to wit, at the several times aforesaid, at the parish aforesaid, and county aforesaid, feloniously, wilfully, wickedly, unlawfully, and of their malice aforethought, did strike and beat, they the said Robert Courtice Bird and Sarah his wife, to the said Mary Ann Parsons then and there, thereby, to wit, with the said stick, at the several times aforesaid, at the parish aforesaid, in the county aforesaid, giving to the said Mary Ann Parsons in and upon the head, chest, shoulders, arms, legs and thighs of her the said Mary Ann Parsons, divers, to wit, ten mortal bruises, of which said mortal bruises the said Mary Ann Parsons, from the said 5th day of November, in the year aforesaid, and the several other days aforesaid, until the 4th day of January, in the year of our Lord 1850, at the parish aforesaid, in the county aforesaid, did languish and languishing did live, on which said

4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish aforesaid, in the county aforesaid, of the said mortal bruises died. And so the jurors aforesaid, on their oaths aforesaid, do say that the said Robert Courtice Bird and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid feloniously, wilfully, unlawfully and wickedly, and of their malice aforethought, did kill and murder, against the peace of our Lady the Queen, her crown and dignity.

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Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Courtice Bird and Sarah his wife, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 5th day of November, in the year of our Lord 1849, and on divers other days and times between that day and the 3rd day of January, in the year of our Lord 1850, to wit, on the 1st day of December in the year of our Lord 1849, and 1st day of January, in the year of our Lord 1850, respectively, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one Mary Ann Parsons, in the peace of God and our said Lady the Queen then and there being, feloniously, wilfully, wickedly and unlawfully, and of their malice aforethought, did make divers, to wit, ten assaults; and that the said Robert Courtice Bird, with a certain stick of the value of one penny, which he the said Robert Courtice Bird in his right hand then and there, to wit, at the several times aforesaid, at the parish aforesaid, and county aforesaid, had and held, and the said Sarah the wife of the said Robert Courtice Bird, with a certain other stick of the value of one penny, which she the said Sarah in her right hand then and there, to wit, at the several times aforesaid, at the parish aforesaid, and county aforesaid, had and held, the said Mary Ann Parsons in and upon the head, chest, shoulders, arms, legs and thighs of her the said Mary Ann Parsons then and there, to wit, at the several times aforesaid, at the parish aforesaid, and county aforesaid, feloniously, wilfully, wickedly, unlawfully, and of their malice aforethought, did respectively strike and beat, they the said Robert Courtice Bird and Sarah his wife, respectively, to the said Mary Ann Parsons then and there, thereby, to wit, at the several times aforesaid, at the parish aforesaid, in the county aforesaid, with the several sticks aforesaid, so held by them respectively as aforesaid, at the parish aforesaid, in the county aforesaid, giving with this, that they respectively, then and there, thereby gave to the said Mary Ann Parsons in and upon the head, chest, shoulders, arms, legs and thighs of her the said Mary Ann Parsons, divers, to wit, ten mortal bruises, of which said mortal bruises the said Mary Ann Parsons, from the said 5th day of November, in the year of our Lord aforesaid, and the several other days aforesaid, until the 4th day of January, in the year of our Lord 1850, at the parish aforesaid, in the county aforesaid, did languish and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish aforesaid, and county aforesaid, of the said mortal bruises so given as aforesaid died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Courtice Bird and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid, by the means aforesaid, feloniously, wilfully, unlawfully, wickedly, and of their malice aforethought, did kill and murder, against the peace of our Lady the Queen, her crown and dignity.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Courtice Bird and Sarah his wife, not having the fear of God before their eyes, but being moved and

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seduced by the instigation of the devil, on the 5th day of November, in the year of our Lord 1849, and on divers other days and times between that day and the 3rd day of January, in the year of our Lord 1850, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said Mary Ann Parsons, in the peace of God and our said Lady the Queen then and there being, feloniously, wilfully, unlawfully, and of their malice aforethought, did make divers assaults; and that the said Robert Courtice Bird and Sarah his wife, with a certain scourge, to wit, a scourge made of certain leather thongs, to a certain stick affixed, of the value of a penny, which they the said Robert Courtice Bird and Sarah his wife in their right hands then and there, to wit, at the several times aforesaid, at the parish aforesaid and county aforesaid, had and held, the said Mary Ann Parsons in and upon the head, chest, shoulders, back, arms, legs and thighs of her the said Mary Ann Parsons, then and there feloniously, wilfully, and of their malice aforethought, did strike and beat, they the said Robert Courtice Bird and Sarah his wife giving to the said Mary Ann Parsons then and there, thereby, to wit, with the scourge aforesaid, at the several times aforesaid, at the parish aforesaid, in the county aforesaid, in and upon the head, chest, shoulders, back, arms, legs and thighs of her the said Mary Ann Parsons, divers mortal bruises, of which said mortal bruises the said Mary Ann Parsons, from the said 5th day of November, and the said other days and times, until the said 4th day of January, in the year of our Lord 1850 aforesaid, at the parish aforesaid, in the county aforesaid, did languish and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish aforesaid, in the county aforesaid, of the said several mortal bruises died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Courtice Bird and Sarah his wife the said Mary Ann Parsons, in manner and form aforesaid, by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace of our Lady the Queen, her crown and dignity.

Fifth count.

Fifth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Robert Courtice Bird and Sarah his wife, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 1st day of January, in the year of our Lord 1850, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said Mary Ann Parsons, in the peace of God and our Lady the Queen then and there being, feloniously, wilfully, wickedly and unlawfully, and of their malice aforethought, did make an assault; and that the said Robert Courtice Bird, with both his hands, and the said Sarah Bird, with both her hands, the said Mary Ann Parsons to and against the ground, then and there feloniously, wickedly, wilfully, and of their malice aforethought, did cast and throw, by which said casting and throwing the said Mary Ann Parsons to and against the ground, the said Robert Courtice Bird and Sarah Bird, then and there gave the said Mary Ann Parsons divers mortal bruises in and upon the head, stomach, sides and back of her the said Mary Ann Parsons, of which said mortal bruises the said Mary Ann Parsons, from the said 1st day of January, in the year of our Lord 1850, until the 4th day of January, in the year of our Lord 1850, to wit, then and there, at the parish aforesaid, in the county aforesaid, did languish and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish afore-

said, in the county aforesaid, of the said mortal bruises died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Courtice Bird and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid, by the means aforesaid, feloniously, wickedly, wilfully, unlawfully, of their malice aforethought, did kill and murder, against the peace of our Lady the Queen, her crown and dignity.

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Sixth count.

Sixth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Courtice Bird and Sarah his wife, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 1st day of January, in the year of our Lord 1850, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said Mary Ann Parsons, in the peace of God and our Lady the Queen then and there being, feloniously, wilfully, wickedly and unlawfully, and of their malice aforethought, did make an assault; and that the said Robert Courtice Bird, then and there, with both his hands, and the said Sarah the wife of the said Robert Courtice Bird, then and there, with both her hands, the said Mary Ann Parsons to and against the ground then and there feloniously, wickedly, wilfully, unlawfully, and of their malice aforethought, respectively, did then and there cast and throw, and that the said Robert Courtice Bird then and there, with both the feet of him the said Robert Courtice Bird, and the said Sarah the wife of the said Robert Courtice Bird, then and there, with both the feet of her the said Sarah, whilst the said Mary Ann Parsons being so then and there cast and thrown to and against the ground, then was then and there upon the ground, the said Mary Ann Parsons in and upon the head, stomach, back and sides of her the said Mary Ann Parsons, then and there feloniously, wickedly, wilfully and unlawfully, and of their malice aforethought, did respectively then and there strike, beat and kick, they the said Robert Courtice Bird and Sarah his wife, then and there, respectively, as well by the casting and throwing of her the said Mary Ann Parsons to the ground as aforesaid, as also by the striking, beating and kicking the said Mary Ann Parsons in and upon the head, stomach, back and sides of her the said Mary Ann Parsons, in manner and form aforesaid, while on the ground as aforesaid, then and there thereby giving to the said Mary Ann Parsons divers, to wit, twenty mortal bruises in and upon the head, stomach, back and sides of her the said Mary Ann Parsons, of which said mortal bruises so caused as aforesaid, the said Mary Ann Parsons, from the said 1st day of January, in the year of our Lord 1850, until the 4th day of January, in the year of our Lord 1850, then and there, to wit, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish and in the county aforesaid, of the said mortal bruises so given as aforesaid died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Courtice Bird and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid, by the means aforesaid, feloniously, wickedly, wilfully and unlawfully, and of their malice aforethought, did kill and murder, against the peace of our Lady the Queen, her crown and dignity.

In his opening to the jury, *Rowe* relied for a conviction upon proof of a series of ill-usages between the 5th of November and the 26th of December; and he concluded thus:—The prisoners

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were charged with the capital offence. No doubt, by the law of England, if persons, by a series of acts of ill-usage and ill-treatment, done wilfully, produced the death of another, that, in the eye of the law, was murder. But the question, whether they did it wilfully—whether it was a premeditated act—was entirely for the consideration of the jury, looking at the facts, and under the direction of the judge.

The material facts proved were as follow:—

Evidence for
the prosecution.

Grace Parsons.—I live at Bideford, and am the mother of the deceased. I saw her after her death on the 4th of January; she was 14 years old in November last. Mrs. Bird had told her that she ordered the child to go down into the kitchen for water the Thursday, and with that she came down, and fell down twice. Then when the child falled down again, they sent the little boy up stairs; and as he was going up with the light, the girl called out, "Don't bring up a light, for I can't bear it in my eyes." Then the little boy came back, he did not go up; but Mrs. Bird went up after to see what she wanted. She said she asked the girl what she wanted, and if she wanted to come out of the bed, and then Mr. Bird went up himself, took the child out, and put her on the chamber utensil. When he lifted her up again, they said they heard something running down, and found that the place the child had in her arm had broke, and there was a discharge. That when Mrs. Bird asked the child how she was, she replied, "Very sleepy—when its all quiet, missis, I shall be able to sleep a bit, by and by." That then both went dower stairs; how long they staid Mrs. Bird did not say, but after that she went up stairs again, and found the child's feet and legs very cold. That she then went down stairs again—took a jar, and filled it with the boiling water, and put it to the child's feet and legs. That then she went down stairs again, and on afterwards returning up stairs, found the child's feet and arms cold, but her face quite warm. With that she went down after another jar of water, which she carried back and put upon the child's arms. Some time in the night she told me that she called out to her husband to go up and see if Mary was dead. That then Mrs. Bird went into the room—that she spoke to the girl, and she did not answer; she was looking smiling—she had not moved, and where she had left the jars she found them. That she spoke to an old man, who slept in the same room, three times before he spoke to her. She said, "I think Molly's dead, for she's very quiet;" and then the old man said, "I think her is, for I've spoke to her several times, and there was no mouth speech."

Cross-examined by Mr. SLADE.—When witness asked her why she had not sent for the doctor, Mrs. Bird replied, "Well, that's the only thing I know I'm in fault." When Mrs. Bird said she had flogged her several times, witness observed there was a mark in the head, Mrs. Bird replied, there had been a tumble, and then gave her the account of the fall by the settle.

William Johns, mason, of Buckland Brewer. Lives about a mile and a half from Gawland, which is a lone farm standing by itself, the nearest house being more than half a mile off. In the month of November last, witness was at Gawland, knew the Birds, Courtice, the uncle, and the deceased. No one but these persons lived in Gawland in November, besides the prisoner's children, the eldest of which is about six or seven years old, Witness was at work there on the 5th of November. Heard

the voice of the female prisoner; the door was open, and she was scolding the deceased something about the pig's-meat. During this time he also heard blows, and after the blows he heard the girl crying. As soon as she began to cry the door was shut. After that he heard more blows, and still heard the girl crying. A few minutes after the girl (deceased) came out; there was blood on her face. Witness spoke to her, and she showed him some marks in her left arm, just above the elbow; they appeared to have been made with a stick. There was also a mark across the neck of the same kind. The maid gave a knock at the door, and one of the little boys went. Presently mistress got up and went out to the girl, and told her in a loud voice, to wash off the blood from the back of her neck, directly.

Richard Hopper, a farm labourer of Buckland. About three or four weeks before I was examined by the magistrates, I saw the girl, who did not appear healthy then. I saw her the day after Christmas day; she then appeared very ill. I saw two or three drops of blood drop from her. On the back part of her head there was a cut. Sarah Bird came out, and told the girl to go in. The girl's shoulders and arms had bruises on them. I saw Sarah Bird flog the girl three or four weeks before Christmas, with a hazel, or nut stick, across the shoulders. About a fortnight before Christmas, I saw Bird strike the girl twice, with a furze stub, across the shoulders, and she cried.

Mr. Charles Colwell Turner.—I am a surgeon of Bideford, I have been in practice there nine years. I went into the room with Branch where the body lay, I caused her to strip the body. I saw on the legs and thighs several wounds, varying in extent, and apparently inflicted by some irregular weapon—it struck me by a birch. On the chest below the left collar bone, were two slight bruises; his attention was also attracted to the discoloration of the face and forehead, which extended from the left temple down the cheek. Also saw some wounds and abscesses on the arms, and also on the fingers; the skin over the bowels was also discoloured. The wound on the left arm was an abscess above the elbow, with the skin immediately around it discoloured; it had the appearance of a bruise of long standing—perhaps a fortnight—and the abscess had burst. On the front of the same arm, below the elbow, was also an abscess, which was just forming. The nails on the little finger, and index or forefinger, appeared to have been gone some time. Those on the middle finger and fourth finger more recently, but all were gone. On the outer part of the right arm, above the elbow, was another abscess, which also had recently burst. The body was then turned over. On the right hip there was a large sloughing wound, about the size of the palm of the hand; and on the posterior part of the hips were several wounds, which appeared to have been inflicted some time; they were covered with plaster, on removing which they appeared to be old sores. Between the two shoulders were two trivial bruises. The outer layer of skin on the back, in some places, was separated from the inner, which I thought resulted from the serous part of the blood having exuded after death, from between the two layers of skin. From the state of the back and abdomen, I cannot specify how long the child had been dead when I saw it, but it had evidently been dead some days (on the Saturday). In giving that answer, I have taken into consideration the state of the weather, which at that time was extremely cold; that state of weather would retard the symptoms of decomposition in a dead subject. I was then desired by the coroner to make a post mortem examination, which I did

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immediately. On removing the skull, I discovered another bruise at the back part of the head, which being covered with hair, I had not before noticed. There was considerable extravasation of blood, that had oozed between the scalp and the skull. On removing the skull, I found the membranes of the brain extremely congested; the skull itself was perfectly sound. On gently moving the brain, I found at the base extravasation of blood. I then examined the chest, the contents of which I found perfectly healthy, with the exception of a slight adhesion of the right lung to the side. The stomach was perfectly empty, and the different organs of the brain perfectly healthy, and in a normal state. I made no further examination, as I felt that I had arrived at the cause of death, which I attributed to external injuries on the head, causing the extravasation which I found within. From the external appearance of the wounds in the head, I can form no judgment of the way in which that violence was inflicted; it would certainly take much heavier blows to cause death in a healthy than an unhealthy subject, a strong rather than a weak constitution. The state of the deceased before death I should think was extremely reduced, and the effect of the external injuries which she had received, without taking the injuries of the head into consideration, would be to reduce the powers of life. These injuries would affect the nervous system, and the nervous system is connected with the brain.

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Cross-examined.—From the extent of surface of the wounds which I have supposed might have been inflicted by a birch, I consider they would have affected the nervous system. The wounds on the finger might, some of them, have been the result of frost bites, but not the cuts in the legs. The abscesses might possibly have been produced by constitutional debility, but the sloughs were the result of external wounds. Frost bites would not have caused the sloughs. A severe bruise might have produced the slough on the hips; a fall might, but not such a blow as might have been received against a bed post. The symptoms disclosed in examination of the brain were similar to those found in persons who died of apoplexy. Extravasation at the base is the most rapid in its effect; previous to extravasation there is congestion, and congestion, if the result of natural causes, could produce giddiness, and giddiness leads to falls; but he did not think that a fall merely on the floor, unless from a height, would produce such an extensive bruise as was found in deceased's head. A person labouring under incipient congestion would shun the light, the glare would be painful, and be an indication of the disease, if coupled with other symptoms. Observed no sign of a kick on the private parts, which were discoloured, but not from the effects of a blow. In cold weather, chaps of the skin very often became bleeding wounds. The blood spoken of by the witness Hopper might have resulted from natural causes. The frost-bitten fingers indicated a low state of the body, and a languid circulation, and that languid circulation tended to a congestion of the liver, the brain, or some important organ. It did not follow that languid circulation would be produced by taking a person from a confined place like a Workhouse, and exposing her more to the open air. Wounds after death have a worse appearance than they have before death.

Re-examined.—The symptoms which witness had spoken of as appearing on deceased's back and abdomen could not have been produced before death, and showed that deceased had been dead thirty hours, at least. In witness's experience such appearances as he had described could not have taken place in less than three days. Incipient congestion of the

brain would depend very much on the nervous system of the subject. Having examined the corpse, and heard the evidence, he thought, that incipient congestion might have arisen from the causes mentioned by the witnesses.

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By his LORDSHIP.—Taking all the circumstances into consideration, he believed that the extravasation was caused by external injuries.

Mr. John Edye.—I have been practising as a surgeon in Exeter for twenty-six years, and am also one of the surgeons of the Hospital. I have heard the evidence to-day. From the statement of Mr. Turner, I conceive he is correct in the opinions that he has formed as to the time which had elapsed between his visit, and the death of the child; but I should not like to speak positively unless I had seen the child. I concur with Mr. Turner in the opinion that he has formed as to the cause of death.

His LORDSHIP asked *Rowe* what he presented to the jury as to the cause of death. He had himself been certainly under considerable difficulty on the matter. He had thought that the kick spoken of by one of the witnesses was the cause of death, until the medical witnesses gave evidence to the contrary, and declared that death was caused by a blow on the head, producing extravasation of the brain, and resulting in death.

Rowe suggested that there was the treatment which had been spoken of, which had the effect of so lowering the frame, that death might have resulted from violence which would not have produced it in a healthy person.

His LORDSHIP thought that would involve the principle that one person having pursued a course of harsh treatment, weakening the constitution, another party would be liable to an indictment for murder, if he inflicted violence not likely in itself to cause death, and which would not have resulted in death, but for the previous violence inflicted by another party.

Rowe.—There is another proposition, whether death was not caused by incipient congestion of the brain, produced by a long series of bad usage. Mr. Turner stated that a series of acts of bad usage would affect the nervous system, and affect the brain, and render it more sensible of injury.

After some observations from *Slade* and *Cox*, it seemed to be the opinion of the counsel, as well as of his lordship, that the case could not be sustained, although there was no doubt that the poor girl had been ill-treated.

The learned JUDGE then addressing the jury, said he regretted not being able to allow this case to go to its legitimate termination, but it was his duty to tell them at once he thought the prosecution had failed. He briefly reviewed the circumstances under which the girl had been placed in the family of the prisoners, in a lonely farm house. Up to a certain time, Mrs. Bird seemed to have been satisfied with her; at any rate, she said she was a good girl. But after that, a fearful change came over the transaction. She was seen to inflict chastisement, which, although his lordship did not

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for one moment approve of it, still, if it could be regarded as a single instance of passion, might have excited but little notice. The girl appeared to have failed in health; she was found dead on the 5th of January, and lamentable injuries were on her person. There must probably have been some violence used by some one, or some neglect. If, in Mr. Turner's judgment, the external injury he saw had directly contributed to death, then the jury would have had to consider the conduct of the prisoners, as bringing home to them either manslaughter or murder; but to sustain either of these charges, it must *first* be distinctly made out that the unlawful act of the prisoners was the cause of death. Now two gentlemen of skill had been called; one had examined the head, and found the cause of death *there*, namely, the pressure of blood on the brain, or that which is commonly called apoplexy; an overcharge of the vessels upon the brain till they burst, and there is an effusion of blood on the brain which stops the functions of life; and he attributed this to the injury at the back of the head which was either from a blow or a fall. There was no proof of any actual injury inflicted which could be the cause of death, except the injury at the back of the head. Now if that injury proceeded from a kick or blow inflicted by either of the prisoners, no doubt it would be manslaughter or murder. It would be murder if done with a weapon likely to endanger life, or with the purpose, disposition, and determination to kill or to do some grievous, serious, and permanent bodily harm. If it had been a sudden act of passion, or a gross and brutal excess of chastisement, that had occasioned her death which had not been contemplated nor reasonably to be expected, then it would have been aggravated manslaughter. But the difficulty here was, there was no proof at all who it was that gave the blow. It was true, the jury might indeed suspect it was one of the prisoners, as there was no one else in the house but the old man, the uncle. In the absence, however, of all *proof*, his lordship could not direct the jury that there was any evidence that affected *one* more than the other of the persons at the bar. Each of them had chastised the girl before, and either *might* have inflicted the blow. But the case was in this difficulty, which he thought fatal to the prosecution. He could not direct them there was anything to lead them to connect one of the prisoners more than the other with that which was clearly by the evidence the cause of death. If it was inflicted by one, the other aiding, both would be guilty; but in the total absence of all proof of that kind, his lordship could see nothing to direct the jury to either. The case indeed presented considerations which, he confessed, made him lament that he was not in a situation to leave this question to the jury; for the circumstances called for solemn and deliberate inquiry, and he deplored the case being left in such a state of uncertainty that he could not direct them to say whether there was any evidence that both inflicted the blow, or, if one, which inflicted it, or at what time, and under what circumstances. Therefore, he was bound to tell them he thought the case for the prosecution had failed in bringing

home that fatal blow, to which the surgeons attributed death, to either of the prisoners at the bar. If the death had been caused by want of food, then the male prisoner alone would have been guilty, for it was *his* duty to provide proper sustenance. If death were caused by accumulated wrongs and injuries during the time she was in the house, that would have been another question. But, as the medical man had stated that the death was caused by effusion of blood, and that by external violence; and as there was no proof how or by whom that violence was inflicted, it seemed to him that the case had failed, and therefore, however they might regret that they could not enter into it on moral considerations, he was bound to tell the jury that, there being no proof which of them did it, they could not *legally* convict either, and consequently both must be acquitted.

Verdict, Not guilty.

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WESTERN CIRCUIT.

DEVON SUMMER ASSIZES, 1850.

Exeter, August 5.

(Before R. GURNEY, Esq., Q.C.)

REG. v. ROBERT COURTICE BIRD AND SARAH BIRD.

Autrefois acquit—Practice—Counsel—Evidence—Bail—Case reserved.

To sustain a plea of autrefois acquit, it is not sufficient merely to put in the record of the first indictment and acquittal. Some evidence must be given to show that the offences charged in the former and present indictment are the same, and this may be done by showing, by some person present at the former trial, what was the offence actually investigated there; and if that is consistent with the charge in the second indictment, it will be a presumptive case, which must be met by the prosecution by proof that the offence charged in the second indictment was not the same as that charged in the first.

The counsel in the case may be examined, to show from his notes, taken at the former trial, what was the evidence then given.

Where a case has been reserved for the Court of Appeal upon a conviction for an assault with intent to commit a felony, the court will not deem itself bound to admit the prisoner to bail until the decision of the point reserved, even although the offence is only a misdemeanor, and the prisoner was admitted to bail of right previously to the trial.

THE same prisoners were again indicted for assaulting the said Mary Ann Parsons on several occasions between the 5th Novem-

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Second count.

ber, 1849, and the 4th January, 1850. The indictment was as follows:—(a)

DEVON, } The jurors for our Lady the Queen, upon their oath, present
to wit, } that Robert Courtice Bird, late of the parish of Buckland
Brewer, in the county of Devon, yeoman, and Sarah the wife of the said
Robert Courtice Bird, late of the same parish, on the 10th day of November, in the year of our Lord 1849, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one Mary Ann Parsons, in the peace of God and our Lady the Queen then and there being, did make an assault, and her the said Mary Ann Parsons, then and there, did beat and ill-treat, with intent, in so doing, her the said Mary Ann Parsons to wound, and with intent, by such wounding, to her the said Mary Ann Parsons then and there feloniously to do some grievous bodily harm, to the great damage of the said Mary Ann Parsons, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Robert Courtice Bird, late of the parish of Buckland Brewer, in the said county of Devon, yeoman, and Sarah the wife of the said Robert Courtice Bird, late of the same parish, afterwards, to wit, on the 10th day of November, in the year of our Lord 1849, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said Mary Ann Parsons, in the peace of God and our Lady the Queen then and there being, did make another assault, and her the said Mary Ann Parsons did then and there beat, wound, and ill-treat, and other wrongs to the said Mary Ann Parsons then and there, to the great damage of the said Mary Ann Parsons did, against the peace of our Lady the Queen, her crown and dignity.

Rowe and Karlake, for the prosecution.

Slude and E. W. Cox, for the prisoners.

The prisoners being called upon to plead—

Slade.—They will plead through me. I put in this plea of *autrefois acquit*.

The following was the plea, which was read by the CLERK of the ASSIZE:—(b)

Plea of *autrefois acquit*.

“And the said Robert Courtice Bird and the said Sarah the said wife of the said Robert Courtice Bird, in their own proper persons now come into court here, and having heard the said indictment read and the matters therein contained, say that they ought not to be put to answer the said indictment, they having been heretofore in due manner of law acquitted of the premises in and by the said indictment above specified and charged upon them; and for plea to the said indictment they say, that our said Lady the Queen ought not further to prosecute the said indictment against them, because they say that heretofore, to wit, at the Assizes and General Session of Oyer and Terminer and General Delivery of the Gaol of our Lady the Queen, holden at

(a) The prisoners were also charged in a second indictment with a common assault. But being convicted on the former, that was not tried.

(b) This plea was drawn by *Mr. Kingdon*, whose well-known abilities as a special pleader give it a peculiar value as a precedent.

the Castle of Exeter, in and for the county of Devon, on Saturday, the 16th day of March, in the thirteenth year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, before Sir William Erle, Knight, one of the justices of our Lady the Queen assigned to hold pleas before the Queen herself, Sir Thomas Noon Talfourd, Knight, one of the justices of our Lady the Queen of Her Court of Common Pleas, and others their fellows, justices of our Lady the Queen, assigned by letters patent of our said Lady the Queen under the Great Seal of the United Kingdom of Great Britain and Ireland, to them the said Sir William Erle, Sir Thomas Noon Talfourd, and others their fellows, justices of our said Lady the Queen, and to any two or more of them directed (of whom one of them, the said Sir William Erle and Sir Thomas Noon Talfourd, or of others in the said letters patent named, our said Lady the Queen willed to be one), they the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, stood indicted, and were duly arraigned upon a certain indictment which charged them the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, by the names and descriptions of Robert Courtice Bird, late of the parish of Buckland Brewer, in the county of Devon, labourer, and Sarah, the wife of the said Robert Courtice Bird, late of the same parish, for that they the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, &c. [setting out the Indictment in full, *ut ante*, p. 1.]

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“And they the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, further say that the said felony and murder so charged upon them in the said last mentioned indictment as aforesaid, included divers assaults therein supposed and alleged to have been made and committed by them the said Robert Courtice Bird and the said Sarah, the wife of the said Robert Courtice Bird, against the person of the said Mary Ann Parsons in the said indictment named. And they the said Robert Courtice Bird and the said Sarah, the wife of the said Robert Courtice Bird, further say that they did then and there respectively plead not guilty to the said last-mentioned indictment, and that they were thereupon then and there in due form of law respectively tried upon the said last-mentioned indictment by a jury of the said county then and there in due form of law summoned, impannelled and sworn to speak the truth of and concerning the premises in the said last mentioned indictment mentioned, and to try the said issues so joined between our Sovereign Lady the Queen and them the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, respectively as aforesaid, and which said jury upon their oaths did then and there say that they the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, respectively were not guilty of the premises in the said last-mentioned indict-

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ment specified and charged on them respectively as aforesaid, as they the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, by their pleas to the said last-mentioned indictment respectively alleged, whereupon it was then and there considered by the said last-mentioned court that the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, of the premises aforesaid in the said last-mentioned indictment specified and charged on them respectively as aforesaid should be discharged and go acquitted thereof without day, as by the record of the said proceedings now here appears. And they the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, further say that they the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, now here pleading, and the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, in the indictment aforesaid named and thereof acquitted as aforesaid, are respectively the same identical persons respectively and not other or different persons respectively, and that the said Mary Ann Parsons in the said last-mentioned indictment named is the same identical Mary Ann Parsons as is named in the indictment to which they the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, are now here pleading; and that the said assaults so included in the said felony and murder so charged upon them the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, in the said indictment in this plea mentioned in this behalf, and therein supposed and alleged to have been made and committed by them against the person of the said Mary Ann Parsons as aforesaid, are the same identical assaults, beatings, ill-treatings, and woundings respectively as in the said indictment to which they the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, are now here pleading, are respectively supposed and alleged to have been made, done, given and committed respectively by them the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, respectively and not other or different. Wherefore they pray judgment of the court here, whether our said Lady the Queen will or ought further to prosecute, impeach, or charge them, on account of the premises, in the said indictment to which they are now here pleading, contained and specified, and whether they ought to answer thereto respectively, and that they may be dismissed this court without delay."

Rowe.—We shall take issue upon this plea, a copy of which has been very properly supplied to us by my friends, that we might give it due consideration, and mould our replication accordingly.

The replication was then put in. It was as follows:—

Replication.

"That they were not acquitted of felony and murder, including the same identical assaults, beating, ill-treating, and wounding,

as alleged in the indictment, to which the said R. C. Bird and Sarah his wife have now pleaded *modo et formâ*."

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Slade.—I object to this replication that it raises two distinct issues, one of law and one of fact. It does not put in issue the question raised by our plea and which the jury are to try, whether these are the same identical assaults. At the best it is an argumentative traverse; it does not deny the fact, but asserts something from which it is intended to be inferred that, as a matter of law, the fact is not so.

Rowe.—We meet your plea in the only way in which it can be met, in order to raise the question that is to be tried, viz whether the prisoners have been already in peril for the same offence.

HIS LORDSHIP.—If Mr. Slade objects to the replication he should demur; that will raise the question whether it is good in law.

Issue was then joined.

The jury were then sworn to try whether the prisoners had been before acquitted of the offence with which they now stood charged.

Slade.—The onus of proof upon this plea is upon the prisoners. Of course they could only make out a *prima facie* case. He should put in the record of the former trial and acquittal, and then he submitted that, the plea having averred that the assaults were the same identical assaults, it would be for the prosecution to prove that they were other and different assaults. It was impossible for him to anticipate what the prosecution was going to prove.

Rowe contended that this was insufficient to maintain the plea. The affirmation of the issue was upon the prisoners, who must show some evidence what were the assaults proved on the former trial, so as to identify them with those now to be tried.

HIS LORDSHIP.—If I should hold it to be necessary to show that these assaults conduced to the death, the prisoners are bound to give some further evidence. The fact must be established by them that these assaults were the same as those for which they had been previously in peril.

Rowe.—Clearly the prisoners must prove that the assaults now charged conduced to the death of the deceased, for it was only for such assaults that they had been in peril before. To support this proposition he cited *Reg. v. Crompton* (1 Car. & Mar. 597); *Reg. v. Connor* (2 Car. & Kir. 518); *Reg. v. Phelps* (1 Car. & Mar. 180); *Reg. v. M'Phane* (1 Car. & Mar. 212); *Reg. v. Birch* (2 Car. & Kir. 193; 1 Den. 185); *Reg. v. Greenwood* (2 Car. & Kir. 339); *Reg. v. Barnett* (2 Car. & Kir. 594); *Reg. v. Lewis* (1 Car. & Kir. 419); *Reg. v. Gould* (9 Car. & P. 364); *Reg. v. Gibson*, 2 Car. & Kir. 781; *Reg. v. Gutteridge* (9 Car. & P. 471); and *Reg. v. Saint George* (9 Car. & P. 483.)

Karslake briefly followed on the same side.

Slade, commenting upon the various cases cited, contended that, under the statute, the jury might have found the prisoners guilty of assault, and therefore they had been in peril by nine of the cases

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cited on the other side; five were directly in favour of his view of it.

Cox referred to *Reg. v. Auty and others* (2 Cox Crim. Cas. 282); and also to *Reg. v. King and others* (2 Cox Crim. Cas. 95.) (a)

GURNEY, Q. C.—The matter now in issue is, whether the defendants had been acquitted of a felony which included the assaults charged in the present indictment, and that being the case, it was incumbent upon the prisoners to establish the identity of the two offences. The question was, whether the putting in the former record was sufficient evidence upon which the jury may find that they were one and the same. The inference from the former record was this—that certain assaults, charged as being similar in their nature were then charged as tending to the death of the deceased Mary Ann Parsons. Now the question was whether the mere putting in of that record was sufficient to prove the plea. It was not, perhaps, the most regular mode of raising the question, but it seemed to him to be fair towards the prisoners, that they should have an opportunity, after hearing his opinion, to shape their case accordingly, and add to it if they were able. He was clearly of opinion, that the evidence which the prisoners' counsel had given was not such as a jury could satisfactorily act upon. It was clear, upon the authorities, that on the former trial the parties could not have been convicted of assaults which were independent of and distinct from, the assault which produced death, unless they were themselves in some way conducive to death. It was not sufficient that it was charged in the indictment, but it must be shown in the evidence that these assaults were conducive to death. His Lordship then proceeded to comment upon some of the cases cited, and said that in one it was held that the "assaults must be involved in and conducive to the charge." The same doctrine was held in the case of *Reg. v. Crompton* (1 Car. & Mar. 597), upon which doctrine Mr. Justice Patteson had acted. There was then the question, whether the law had been altered. It was laid down that, to convict of an assault under the statute of 7 Will. 4 & 1 Vict. c. 85, s. 11, the assault must be included in the charge upon the face of the indictment, and also be a part of the very act or transaction which the crown prosecutes as a felony by the indictment. His Lordship then remarked that, unless the prisoners' counsel could go much further, it was his duty to tell the jury there was no evidence on which they could with safety act, so as to say that the plea was made out: in fact, the jury must be satisfied that the assaults charged in the present indictment were not distinct assaults, wholly unconnected with the cause of death, but that they formed part of the very act prosecuted as a felony, and were conducive to the death.

Slade applied to have the point reserved, as it was a novel one.

HIS LORDSHIP said he would consider the application.

(a) The argument is thus briefly stated here, because it will be found fully reported in the proceedings before the Court of Criminal Appeal.

Mr. Justice Talfourd's notes upon the former trial for the murder were then read, for the purpose of showing the different beatings which had then been proved, and that they were then considered to have been conducive to the death.

After some discussion, in which Mr. Rowe contended that there was no case to go to the jury, which his lordship overruled :—

Mr. Dennison, reporter for *The Times*, was called by *Slade*, and examined. He had not his short-hand notes of the trial, and was therefore interrogated from memory. He recollected that the surgeon, Mr. Turner, had stated that the child's death was caused by a blow or blows upon the head, and in this opinion *Mr. Edye* concurred.

Mr. Cox was also examined.—He was junior counsel for the prisoners, and had taken notes of the trial, and referring to them, stated that the assaults in the indictment were presented to the jury as parts of the charge—they were presented as links in the chain of evidence, and these several assaults were proved by the witnesses. He believed the assaults were identical with those now charged against the prisoners.

Rowe then called

Mr. C. C. Turner, surgeon, of Bideford, who stated that on the 5th of January he was applied to about the death of Mary Ann Parsons, and went to the prisoner's house. Examined the body of the deceased : it was stripped in his presence. Saw on the legs and thighs a great number of wounds, varying in extent and character, as if inflicted by a birch. On the arms and legs there were other wounds, and likewise on the hips and loins. On the head there was an extensive bruise from the forehead to the cheek on the left side. Witness made a *post mortem* examination. On the back part of the head there was an extensive bruise, and a considerable quantity of extravasated blood. The membrane of the brain was congested. Witness believed that the injury on the head was the cause of death. The gorging of the blood on the brain and extravasation of the blood are sufficient of themselves to cause death. Witness deemed that cause sufficient, and was therefore satisfied. He made an examination of other vital parts of the body, but found nothing there to account for the death. Could not give an opinion whether the other surface injuries would have caused death.

Cross-examined—The powers of life were much reduced. There was no fracture of the skull. The body was very much emaciated.* Witness could give no opinion as to whether the wounds and bruises on the body, independently of the blow, were sufficient to endanger life—regard being had to the reduced condition of the girl. Never knew a case of blood effusing itself on the brain after death, and, not believing that it could be so, he had arrived at the conclusion that the blow had caused the effusion. The external injuries tended to reduce the powers of life, and endangered life. The external wounds generally might have produced congestion of the brain, without the blow on the head. Did not think it was attributed to the blows on the body.

By his LORDSHIP—The blow on the head was the cause of death, and nothing else in his opinion had contributed to it.

Mr. Edye, surgeon of Exeter, corroborated the evidence of the last witness generally.

Rowe applied to put in the notes of the learned judge, with respect to the other evidence, to which *Slade* objected.

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Rowe deemed it unnecessary to trouble the jury with any remarks upon the case.

Slade then addressed the jury for the prisoners.

His LORDSHIP summed up.—The prisoners, Robert Courtice Bird, and Sarah, his wife, were indicted for having committed an assault upon the body of Mary Ann Parsons. To that charge they pleaded that they had already been tried and acquitted; and the question therefore for the jury was not that which the learned counsel had stated, whether any of the assaults charged may have contributed to the death, but was there any one assault which did not contribute to the death? The counsel for the defence had stated that it was exceedingly hard that a party should be twice put upon his trial, and he had complained of the conduct of the learned counsel for the Crown that, whereas on a former occasion it was contended that these assaults were the cause of death, or conduced to the death, they now say that they were not the cause of the death. But there were two parts to the former inquiry. The counsel for the Crown contended that the assaults were the cause of death; the counsel for the prisoner, on the other hand, contended that they were not the cause; and having then succeeded, the prisoners were consequently acquitted. He could not therefore say that there was any hardship in their being tried for the offence now charged. The question which he should put to them was—supposing this to be so—were they satisfied that each one of the assaults proved to have been committed upon the body of the girl, contributed to her death, and whether there was an assault distinct from, and which did not conduce to, the death. If there was one such, the prisoners had not been put in peril before for that one assault, and were, therefore, liable to be tried for it now. The evidence was, that on an examination of the body, marks of various injuries, inflicted at different times, were found—these injuries being distinct from the blows on the head; and the medical men had stated that death was caused by a blow on the head. If that should be the opinion of the jury, they must find the issue in favour of the Crown, because the prisoners had not been placed in peril before. It had been proved undoubtedly, by the medical men, that the vital powers were reduced in consequence of the injuries to the body; but though they could not say what might have been eventually the result of such lowering of the vital powers, they had been able to form a positive opinion on this particular matter—that the death of the child was alone caused by the injuries inflicted upon the head. If, therefore, the jury were satisfied upon that, it would be their duty to find for the Crown, but if they should be of opinion that there was no other assault, other than and excepting that which had tended to the cause of death, then it would be their duty to return a verdict in favour of the prisoners.

Gurney, Q. C.,
charge to the
jury.

The jury, after half an hour's deliberation, returned a verdict for the Crown.

On the following day,

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ET UXOR.

1850.

*Autrefois acquit
—Practice.*

HIS LORDSHIP said, addressing the counsel for the defence, that he was requested to reserve the point which he had directed the jury's attention to last evening, for the Criminal Court of Appeal; and upon great consideration he had come to the determination that he would reserve that point. Looking, however, at the serious nature of the charge against the prisoners, and supposing that he was right in his ruling, according to the judgment of the court above, he did not consider that he could admit the prisoners to bail.

Slade.—The prisoners have been on bail previously to meet this very charge of misdemeanor.

HIS LORDSHIP.—But it is not a common misdemeanor—it is an assault, with intent to commit a felony.

Slade.—But it is not an assault, my Lord, laid as an aggravated one.

HIS LORDSHIP.—The charge is for assaulting, with intent thereby to do grievous bodily harm.

Slade.—The charge is not one of aggravated assault. Your Lordship has no power to give the prisoners any greater punishment than that attached to a common assault.

HIS LORDSHIP was understood to dissent from this.

Slade.—With the most perfect submission, my lord, I beg to say that with regard to the bail, if it should turn out that your Lordship should be wrong in your ruling with respect to the point that has been reserved, the prisoners would have been improperly, or at least unlawfully, detained in prison for a long period. Now the question cannot be decided until after November, and the only object your Lordship has, in refusing the bail, is to see that they are forthcoming at the proper time. After the last assizes, the prisoners were, by an order of government, arrested to take their trial, upon the charge now laid against them, and yesterday they surrendered themselves. I cannot, therefore, my Lord, see any reason for supposing that they would not surrender when again called upon.

HIS LORDSHIP replied that he pursued this course, in order to secure the prisoners, supposing the conviction was decided to be right. He did not wish to inflict unnecessary punishment upon them, but it was necessary, for the ends of justice, that they should remain in prison until the technical objection was disposed of. It was a very serious offence with which they were charged, and it was necessary, therefore, that the prisoners should remain in custody, in order to secure their attendance at the proper time. He was very glad to have had the opportunity of consulting Mr. Justice Coleridge upon the case, and he had expressed his opinion, and authorized him to state, that he should not be justified in reserving the point for the decision of the Court of Appeal, unless the prisoners were detained in custody. His Lordship, therefore, refused the application.

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Slade suggested to his lordship, that if the prisoners should be convicted, the imprisonment which they would now undergo might be included as a part of their sentence. The sentence could not be passed until next March assizes.

HIS LORDSHIP.—The imprisonment will most assuredly be taken into account.

Rowe then stated, in reply to his lordship, that he did not intend to proceed with the other indictments until after the reserved point had been determined upon by the court above.

COURT OF CRIMINAL APPEAL.

(Before LORD CAMPBELL, C. J., JERVIS, C. J., POLLOCK, C. B., PARKE, B., ALDERSON, B., MAULE, J., PATTESON, J., COLERIDGE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., WILLIAMS, J., TALFOURD, J., and MARTIN, B.)

REG. v. ROBERT COURTICE BIRD AND SARAH BIRD.

Murder and manslaughter—Assault—Evidence—Autrefois acquit—
1 Vict. c. 85, s. 11—Practice.

Prisoners were indicted for the murder and manslaughter of A., inter alia, by a series of beatings and assaults. At the trial, certain assaults were put in evidence, and relied upon by the Crown as being the cause of death. But the surgeon who made a post mortem examination being of opinion that the death was occasioned, not by the assaults so proved and relied upon, but by a blow upon the head, of the cause of which there was no evidence whatever, the judge directed the jury that the prisoners were entitled to an acquittal.

Held, by all the judges, that the judge had rightly so directed the jury.

By stat. 7 Will. 4, and 1 Vict. c. 85, s. 11, it is enacted, "that on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and where such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years."

Held, by Pollock, C. B., Patteson, Coleridge, Wightman, Cresswell, Erle, Williams, and Talfourd, JJ., that under this provision of the statute, the prisoners could not have been lawfully convicted of assault under the circumstances above named, inasmuch as the assault contemplated by the statute must be such as was a part of the very act and transaction prosecuted, and also conduced to the death:

Campbell, C. J., Jervis, C. J., Parke, B., Alderson, B., Maule, J., Martin, B. dissentientibus.

The prisoners, having been subsequently indicted for those assaults, pleaded autrefois acquit, and the judge having directed the jury, upon the trial of this plea, to the effect that if they were satisfied there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown.

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Held, by Lord Campbell, C. J., Jervis, C. J., Parke, B., Alderson, B., Maule, J., Patteson, J., Wightman, J., and Martin, B., that such direction was not strictly right, inasmuch as the issue raised by the plea was, whether the prisoners had been before tried for the same offence; but, nevertheless, held by Patteson and Wightman, JJ., that the misdirection was not sufficient to invalidate the verdict.

Held, by Lord Campbell, C. J., Jervis, C. J., Parke, B., Alderson, B., Maule, J., and Martin, B., that the conviction was bad also by reason of the misdirection.

Where the prisoners had joined in their plea at the trial, and were represented by counsel appearing for them jointly, and not separately:

Held, that according to the practice of the Court of Criminal Appeal, they are not entitled to appear by separate counsel at the hearing of the appeal.

For affirming the conviction, Pollock, C. B., Patteson, Coleridge, Wightman, Cresswell, Erle, Williams, and Talfourd, JJ.

For holding the conviction bad, Lord Campbell, C. J., Jervis, C. J., Parke, B., Alderson, B., Maule, J., and Martin, B.

(Before POLLOCK, C. B., WIGHTMAN, WILLIAMS, and TALFOURD, J.J., and MARTIN, B.)

November, 1850, and February, 1851.

[It has been deemed desirable to report shortly the proceedings at the first hearing of the appeal before the five judges who constituted the court, because many arguments were then used which were only briefly, if at all, adverted to in the subsequent argument before the full court, and, as they had been widely published and much canvassed, they might be supposed to have had some influence upon the subsequent deliberations. At all events, they may be useful for reference in other questions that may arise hereafter upon the law of *autrefois acquit*. An endeavour is made to avoid repetition.]

Cockburn (Solicitor-General), Rowe, Q.C., and Karslake, appeared for the prosecution.

Slade for prisoner R. C. Bird.

E. W. Cox for prisoner Sarah Bird.

The following was the

CASE.

The prisoners were indicted for having, on the 10th November, 1849, assaulted Mary Ann Parsons with intent to wound, and with intent by such wounding to do her grievous bodily harm.

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acquit.

The prisoners pleaded that they had been before acquitted of the offence charged.

The plea set out an indictment for murder, the 1st count of which charged murder of Mary Ann Parsons by striking, on the 5th November, 1849, with a stick, on the head, chest, shoulders, back, arms, legs, and thighs, causing divers mortal bruises, of which she died on the 4th of January, 1850. The 2nd count alleged the mortal bruises to have been caused by divers beatings between 5th November and 1st of January. The 3rd count alleged beatings on 5th November, 1st December, and 1st January, and on divers other days between 5th November and 1st January. The 4th count alleged the mortal bruises to have been caused by blows inflicted with a scourge made of leather thongs. The 5th count alleged the mortal bruises to have been caused by casting and throwing her against the ground on the 1st of January, 1850. The 6th count alleged the mortal bruises to have been caused by throwing her on the ground, and then kicking and beating her, on the 1st of January, 1850.

It then alleged that the indictment included divers assaults against Mary Ann Parsons, and that the prisoners were acquitted upon the said indictment, and that the assaults included in the felony and murder charged upon them in the said indictment were the same as those charged in the present indictment. The replication to this plea averred—

That the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the present indictment.

Case.

The form of record was put in, and it was proved that on the former trial evidence had been given of different assaults committed by the prisoners upon the deceased through the months of November and December, one on the 5th of November with a stick upon the arm and neck, one at the end of November or beginning of December with a stick across the shoulders, another with a furze bush about the 11th of December, and it was also shown that some time before the death, but the precise time was not fixed, the deceased had been flogged with a birch on the legs and thighs.

The counsel for the prosecution, in opening the case to the jury on the former trial, had opened these different assaults as conducing to the death, but stated that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners.

It being proved, however, on that trial, as it also was on this, that the death which took place on the 4th of January was caused exclusively by one particular blow on the head, inflicted shortly before the death of the deceased, and there being no evidence to show that that blow had been struck by either of the prisoners, they were acquitted.

It was not shown before me that there were any other assaults committed but those which had been given in evidence on the former trial.

Under these circumstances the following question of law arose, Whether the general acquittal pronounced at the former trial could operate as a bar to a prosecution for each and every of the assaults so given in evidence?

After telling the jury that the burthen of proof lay upon the prisoners, who were bound to establish the truth of their plea, I directed them that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown.

The jury thereupon found a verdict for the Crown, but a doubt existing in my mind whether I was right in my direction to the jury, I thought it fitting to state the foregoing circumstances, and the questing of law arising upon them for the opinion of the justices of either bench and the barons of the Exchequer under the act of the 11 & 12 Vict., intituled, *An Act for the further Amendment of the Criminal Law*, and the case before stated is the case upon which such opinion is required.

I did not pass judgment on the prisoners, and they still remain in prison.

(Signed) RUSSELL GURNEY.

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acquitt.

Slade, having read the case, said that, on the part of the male prisoner, R. C. Bird, he had now to submit to the court that he was entitled to an acquittal upon the plea of *autrefois acquit*, because he had been already in peril for the same offence. The identity in fact of the assaults proved on the first indictment with those charged on the second indictment was admitted; but then it was said that an acquittal for a felony could not be pleaded in bar to an indictment for a misdemeanor. That was so, but the statute 1 Vict. c. 85, s. 11, had made a special provision for cases in which the felony charged included an assault, empowering the jury in such cases to acquit of the felony and find the prisoner guilty of assault, if the evidence should warrant such finding. The question, then, which was now submitted to the court, was this. Were the prisoners in peril of a conviction for these assaults at their trial upon the first indictment? He contended they were so, because by that statute they might then have been lawfully convicted of assault. The Crown, on the other hand, asserted that the statute did not extend to permit of a conviction for these particular assaults, although they were put in evidence against the prisoners at the first trial; that they could not then have been legally convicted of them, and, therefore, not having been in peril upon these particular charges, they are not entitled to *autrefois acquit*. The question, therefore, which he should now submit to the court turned entirely upon the construction of the statute, and he admitted that there had been a difference of opinion among the judges upon it, but he should show that the preponderance of authority was very greatly indeed in favour of the construction which he maintained to be the right one. It would be material to ascertain whether the assaults proved were part of the very act and transaction which the Crown prosecuted as a felony. Of that there could be no doubt. It was stated in the case that the counsel for the Crown relied upon those very assaults. Towards the close of that first trial, the medical men who were called, put an end to the case, so far as the felony was concerned, by stating that the death was caused by a blow inflicted on the skull some time before the death. There was no evidence whatever to connect either of the prisoners with the infliction of that blow, and, as he thought, with the unanimous concurrence of every member of the bar who was present, his lordship directed an acquittal. Upon that occasion little or no consideration was given to the question whether the prisoners could be convicted of an assault. There was no

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argument upon it. Mr. Rowe suggested that they might be guilty of an assault, but the point came on him not quite so much by surprise as it did upon his friend. He cited the case of *Reg. v. Crompton*. The learned judge adopted that view, and said there could be no conviction for an assault. At the last summer assizes the prisoners were indicted for the assaults which were the subject of the present inquiry. No other assaults were proved to have been committed by the prisoners except those that were opened to the jury by the counsel for the prosecution and proved on the former trial. The identity of the assaults was clear. It was, therefore, submitted that the prisoners were entitled to an acquittal; but the learned judge (Mr. Gurney) adopted the very words used by Mr. Justice Patteson in *R. v. Crompton* (1 C. & M. 597), and put it to the jury that, unless they were satisfied that there were several distinct and independent assaults, some of which did not conduce to the death of the deceased, it would be their duty to find for the Crown. Two questions arose upon this: first, whether upon the facts stated, the prisoners were not entitled to be acquitted upon proof of the identity of the assaults; and secondly, whether the learned judge did not misdirect the jury in stating that they must find a verdict for the Crown unless they were satisfied there were several distinct and independent assaults, none of which conduced to the death of the deceased. To come within the statute, it must be a felony, which included a charge of assault. There had been considerable difficulty in putting a construction upon the words of the statute, much of which might have arisen from Mr. Greaves's note to "Russell on Crimes," which note had not met with the sanction of the learned judge, Baron Parke saying that, if that note was to be considered as law, the statute would be frittered away. He would bring forward every case upon the point, and with the exception of that of *R. v. Crompton* no one case supported the view of the learned judge. In 1842 the decision in the *R. v. Crompton* was given, and in 1846 the same judge (Mr. Justice Patteson), in assisting a judge who was trying a prisoner, when the same identical question arose, recommended a verdict to be found for the assault, and reserved the question for the fifteen judges, and they held that a verdict for assault could be found.

[The learned counsel then cited in succession each of the cases which had been decided upon the construction of the statute, commenting upon each as he proceeded. As the same cases were cited on the subsequent argument before the full court with a still more ample and able commentary, it will be unnecessary to repeat them here, but the reader is referred to the after proceedings for a full report of them. He concluded his lengthened review and argument thus:—

It will be seen from these cases that, with two exceptions only, the whole current of the decisions had been to adopt the construction of the statute for which he was contending, viz. that the assault need not conduce to the death, although it must be part

of the very act or transaction which the Crown was prosecuting, and the only test of that can be, if it was included in the indictment and produced in evidence? In this case these very assaults had beyond doubt been charged in the indictment; they had been put in evidence for the purpose of procuring a conviction, and they were not laid aside until it was found that they did not support the charge they were adduced to establish. Having been so charged and so put in evidence, they were as a part of the very act or transaction *prosecuted*; although not proved, they were clearly within the words of the statute, and the construction put upon it in *Reg. v. Birch*; the prisoners might have been found guilty by virtue of the statute of those assaults, and they are entitled to their plea of *autrefois acquit*, now that those self-same assaults prosecuted again.

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—*Autrefois*
acquit.

E. W. Cox, for the prisoner, Sarah Bird, said that he should submit to the court altogether a different line of argument. He adopted all the arguments of Mr. Slade, but to avoid repetition he would confine himself to another view of the question. He claimed an acquittal also by virtue of the general law of *autrefois acquit*. It was an ancient constitutional law, designed for the protection of the subject, and like all such laws, to be construed liberally in favour of life and liberty. Having looked back into the earliest authorities upon that law, he was satisfied that it was not dependent upon any technicalities or refined constructions of the words of a statute, but that it was entirely a question of *fact*, to be tried by a jury and to be submitted to them *as* a question of *fact*. The principle of the law is, that no man should be put in peril twice for the same offence, and that phrase does not mean the same crime in legal definition, but the same *act done*, which is charged as crime, whatever the name affixed to it by the law. Thus, an acquittal for manslaughter can be pleaded in bar to an indictment for murder, and *vice versa*: (*Holcroft's case*, 2 Hale.) Why? Because the prisoner has been already tried for the same *act done*, although they are different offences in law. So, an acquittal on an indictment for a burglary *with violence* may be pleaded in bar to an indictment for murder resulting from that violence: (*Reg. v. Gould*, 9 Car. & P. 364.) And, for the same reason, the act done has been already investigated, and the prisoner having been charged upon it and put to his defence upon it, has been in peril for that act, although the offences are so different. What, then, in *autrefois acquit*, is the question at issue, which the jury are to try? Nothing more than this, *aye* or *no*, is the act that is charged as a crime in the second indictment the same identical act which was charged as a crime in the first indictment, and for which he was then tried. If it be proved that the act now prosecuted *was* in truth charged in the first indictment, and there is a general acquittal upon that indictment, then is the prisoner acquitted, not only of everything that *was* proved under that indictment, but also of every thing that *might have* been proved under it, even although it had not been put in evidence at all: (*R. v. Sheen*, 2 Car. & P. 634.)

Argument of
E. W. Cox for
S. Bird.

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S. Bird.

This is the law of *autrefois acquit*. It is wholly a question of *fact* for the jury, and the manner of trying it will at once show what is the single question that upon such a plea is to be left to the jury. Applying it to the case now under consideration, and it will be seen how wrong was the direction of the learned judge, and also how entirely the case falls within the limits of the law. At the first trial, the prisoners were charged, in various counts, with feloniously causing the death of their servant girl—among the other alleged causes of death was a series of beatings extending from the 1st of November to the day before her death. Clearly, then, *the act* of divers beatings was charged in the indictment. Beatings on the days named were put in evidence for the purpose of supporting that charge of murder by those beatings. It turned out, according to the opinion of a medical man, that those beatings did not in fact cause her death, and the prisoners were, therefore, acquitted. Had they not been in peril upon that charge for that very *act*? Might not the jury, if they had pleased, have disbelieved the surgeon, and come to the conclusion that those beatings *did* conduce to the death, and were not the prisoners, therefore, in peril upon them? Suppose, as was very possible, that three or four surgeons had been called instead of one, and they had differed in opinion as to whether the beatings did or did not occasion death; surely, in such case, the jury would have been obliged to form an opinion upon the contradictory testimony, and if then they had acquitted, could it have been said that the prisoners were not in peril for those assaults, seeing that their lives depended upon the balance of opinion in the jury's minds? And is there any difference in fact whether there was one medical man or four? The jury were not bound by his opinion. They might, if they had pleased, lawfully have convicted upon their own view of the case, on their own belief as to the cause of death. If a surgeon or an amateur of medicine had been upon the jury, he might have differed from the opinion of the witness, and persuaded his fellows that Mr. Turner was wrong. If a lawyer had been upon the jury he might have told them as the law is, that if those beatings had weakened her frame so that they had shortened her life by a single hour, they would have conduced to the death. These suppositions are put to show that, in truth and fact, the prisoners were in peril upon that first indictment, that the jury might have legally convicted them of murder or manslaughter for those very assaults; that it was altogether a question of *evidence* which the jury alone had a right to determine, which they did determine, which they might, if they had pleased, have determined otherwise, and which, if they *had* so determined, would have left the prisoners *lawfully* convicted, with no other remedy than the Queen's pardon in case the judge was not satisfied that the evidence justified the verdict. If then, they might lawfully have been convicted of murder or manslaughter by those assaults—have they not been tried for them and in peril for them, and is not an acquittal a discharge from everything charged in that indictment? Suppose

the case reversed: that they had been convicted of the murder or the manslaughter, and then they had been indicted again for those assaults. What would have been the argument? Your lordships would instantly have felt that in truth and fact they had been already tried and punished for them. But if those assaults did not, as the prosecution asserts, conduce to the death, then they would not merge in the felony, and to a subsequent separate indictment for each one of them the prisoners, according to the argument of the prosecution, would be liable to another conviction and punishment. Common sense at once revolts from this conclusion, when thus put; but the case is not altered in the least when the plea is a former acquittal, for where *autrefois convict* would lie, *autrefois acquit* may be maintained. The one is the test of the other. When the act charged in the first indictment is again prosecuted we plead *autrefois acquit*, that is, we say that the assaults now charged are the same identical assaults as those for which we have been already tried and acquitted. That is our plea. The proper replication to this is—that they are not the same assaults but other and different assaults. But the prosecution replied with a pleading obviously bad, and which was not an answer to our plea and did not raise the issue. The only question really to be tried in *autrefois acquit*, is whether the offence laid in the second indictment is the same offence as that charged in the first. The proof is on prisoners. We proved it by the only means in our power, producing the first indictment to show what was the offence charged, calling witnesses to show what was the offence proved, and then, having made a *prima facie* case it was for the prosecution to prove that the offence it then charged was not the same offence as had been previously tried. But in this case the prosecution attempted to prove no other assault than that which it proved on the first trial. Then the question raised by our plea being purely the question of *fact*, aye or nay, were they the same identical assaults, that question, and that only, should have been put to the jury; but it was not put at all; the jury were told to consider only whether those assaults had conduced to the death, a point that was not in issue upon the pleadings, and was not the question they were empanelled to try, so that upon this wrong direction, also, the prisoners are entitled to an acquittal.

But, then, it is said by the prosecution, this is an indictment for a misdemeanor, and you cannot plead an acquittal for a felony in bar to it. He was not sure of that: there is no authority for such a position, and he should be prepared to contend, that if the very same *act* has been once made the subject of a criminal charge, it could not be again charged merely by altering its name. But that point needs not be discussed here. The statute had removed that difficulty: it had enabled the jury to convict of assault, and therefore had in fact subjected the prisoner to peril of a conviction for a misdemeanor. Now, what was the plain reading of that statute, apart from judicial doubts? Put into popular language, it was

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obviously this, that wherever the felony charged—that is to say—for which the prisoner was being tried, in its nature included an assault, the jury might, if the evidence failed to establish the felony, but only established an assault, acquit of the felony and convict of assault. This was the common sense meaning of the words, and the present case precisely applied to them. Here the charge was an offence which in itself included an assault, the evidence failed to establish the felony, but it established the assault, and therefore the jury might have found the prisoners guilty of assault by virtue of the statute. But even if some more obscure meaning could be put upon the words of the statute, the prisoners were yet entitled to their *autrefois acquit*, because the statute has given it to the jury as a question of fact, not to the court as a question of law, the power to determine whether the evidence warranted a finding of guilty of assault, and inasmuch as the power was vested in the jury as a question of fact, and they *might* have used it, if they had pleased to do so, the prisoners had been in peril under the statute, however construed. In conclusion, he called upon the court to put the most liberal construction upon the law of *autrefois acquit*, as upon all law, for the protection and liberty of the subject, and to say that in truth and fact the prisoners had been tried before for the very same act and offence for which they were now convicted.

Argument of
the Solicitor-
General for
the Crown.

The *Solicitor-General* (Cockburn), (with whom were *Rowe*, Q. C., and *Karslake*) for the crown.—The importance of this case had not been exaggerated. It involved large questions of criminal law, and it had been very fairly and ably argued on the other side. The Crown was only desirous that the true state of the law should be ascertained, and he would begin by observing that the law of *autrefois acquit* was not to be construed so liberally as his friend had contended; but rather, it was to be construed strictly and reduced to the narrowest limits, as a law rather conducing to the escape of guilt than the protection of innocence, insomuch that many thinking men had come to question whether it ought to be retained at all in our criminal jurisprudence. The entire principle and practice of that law would be found in the case of *R. v. Vandercomb* (1 Leach), and it was there laid down that the test whether the plea could be maintained was this, viz. whether the evidence produced to support the second indictment would have sufficed to procure a legal conviction upon the facts? Starting with that proposition, the question resolved itself into this—whether the prisoners, upon the facts, could have been convicted upon the first indictment; and there could be no doubt that they could not have been convicted of murder. The facts were these:—These two persons being charged with the murder of an apprentice girl, it appeared that a series of cruelty and ill-usage had been inflicted upon her by the prisoners, but it appeared it was not these beatings and ill-usages which had occasioned the death, the surgeons negating that, and proving the death to be attributed to a particular blow inflicted a few days

before the death. There was evidence to show that the two prisoners had inflicted beatings which the surgeons disconnected with the cause of the death. There was no evidence to show by whom the last fatal blow had been inflicted.

MARTIN, B.—There was no evidence that either of the prisoners gave the fatal blow.

The *Solicitor-General*.—There was no evidence to show whether the blow had been inflicted by either of them. Under these circumstances, therefore, it was impossible either of the prisoners could have been convicted. The matter had caused considerable sensation, and he might say there was not upon this a dissentient voice in the whole profession.

POLLOCK, C. B. was glad to hear this observation, because it was desirable that the administration of justice should be free from reproach, and that there should be no failure of justice. In the case of the Mannings he had felt himself obliged to tell the jury, and he did tell them, that if they upon deliberation thought that a murder had been committed beyond a doubt, and committed by either of the prisoners, but after the utmost deliberation they thought the other was innocent, and could not fix the guilt distinctly upon either, they would be bound to acquit both. That was clearly the law of the land.

The *Solicitor-General* hoped that it would not be deemed impertinent if, after the discussion which had taken place with reference to this memorable trial, he expressed not only his own profound conviction, but the unanimous conviction of every lawyer in Westminster-hall. The authorities had been so much commented upon that he would only take a rapid review of them. He admitted that there was considerable conflict in the authorities, and he must have recourse to principle in order that the court might lay down some rule which might be considered as authority. The whole question turned on the effect of the statute 7 Will. 4 and 1 Vict. c. 85. Prior to that statute a person charged with felony could not be convicted of a misdemeanor involved in that felony; but the statute had provided for such a case. It frequently happened that persons charged with felony were acquitted, the proof of the felony failing, although it might be clear that they were guilty of grievous assaults. The object of the statute was, in case of a failure to make out the charge of felony, to enable the jury to convict the party of an assault. Some cases seemed to have gone to this extent—that if a felony was charged and a misdemeanor of assault proved, although that assault should not be connected with the felony, still the party might be convicted of the assault. Such had been the opinion of Baron Gurney in *R. v. Poole* (9 Car. & P. 728.) Still he did not think, when the court reviewed the cases, they would feel bound by the opinion thrown out in that case, which certainly had been overruled. His proposition was this, that in order that a conviction might take place, the assault must be one connected with the circumstances relied upon to make out the felony—in this case with the death—

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in others with the robbery or rape, &c. There must be something connected with the main felony itself, and although one learned judge might act upon one principle and another upon another, they would find that in all the assault was immediately connected with the chief transaction which was charged as the felony and inseparable from it, and that in all the cases some other ingredient only was waiting to make out the felony. In one of the cases his friend had relied upon, *Reg. v. Ellis* (8 Car. & P. 684), the parties were charged with robbery, but the particular prisoner was not seen to have committed the robbery, but was seen to commit an assault. He was seen in the course of the transaction which led to the robbery—the robbery was part and parcel of the same transaction, connected in point of time, connected in point of immediate sequence; but there was a failure of proof of the robbery. It was said that it was competent for the jury to convict of the assault; but that was the judgment of a single judge, and very shortly afterwards the doctrine was not upheld. In the case of *R. v. Gould* (9 C. & P. 364), there had been no argument. It was not because the statute made it competent to the jury to convict a man of the misdemeanor that it was necessary he should be convicted, and by that means escape the higher penalty which would attach to the minor felony involved in the matter. As to the case of *Reg. v. Archer* (2 Moo. C. C. 282), the question was, whether upon a joint indictment one party could be convicted of a felony and the other of a misdemeanor? It was held they could. Then in *Reg. v. Gutteridge* (9 Car. & P. 471), Baron Parke said that in an indictment for felony they ought not to convict of a complete, independent, and distinct assault, but only of such an assault as was connected with the felony charged. In the case of *Reg. v. St. George* (9 C. & P. 482), for attempting to fire a pistol, with intent, &c., the question was, whether the prisoner could be convicted of an assault committed with his hand prior to having drawn out the pistol? Baron Parke said his idea was that the prisoner could only be found guilty of that assault which was involved in and connected with firing the pistol. They then came to the case which underwent the consideration of the fifteen judges, *Reg. v. Phelps* (1 Car. & Mar. 180), an indictment for murder. Phelps had struck the deceased with his fist several times, but then went away, and was not present when the fatal blow was struck. The jury found Phelps guilty of the assault, but acquitted the others altogether. The point was reserved, and the judges held that the conviction was wrong, because the blows were disconnected with the cause of death. How was it possible to distinguish that case from the present? Then they came to the case which had been relied upon by his friends at the trial for the murder; *Reg. v. Crompton* (1 Car. & Mar. 597.) Then there was the case of *Reg. v. Boaden* (1 Car. & K. 395), where Baron Parke had left the assault to the jury, but upon conviction gave so slight a punishment that the point was not reserved. It was monstrous to suppose that where a party was acquitted of a felony he might be convicted of

an assault which was totally disconnected from the felony. It was not because a felony involved an assault that therefore you might convict a man of any assault whatever. *Reg. v. Birch* (1 Den. C. C. 185; 2 Cox C. C. 22), was a robbery. The prisoner was acquitted of the robbery and convicted of the assault, but it was clear that the main point there was the intention to rob. It was considered as one and the same transaction. The jury negatived the intent. The greatest consideration was given to Mr. Greaves's note to Russell, who had contended that it was necessary that the intent to commit the felony should be made out in order to warrant the conviction for the assault. The contention had been as to the correctness of that note. The judges held that the jury had properly convicted of the assault. The next case was that of *Reg. v. Greenwood* (2 C. & K. 339), tried before Mr. Justice Wightman—a robbery with violence. There was no proof of the robbery, but only of an assault. Mr. Justice Wightman consulted Mr. Justice Cresswell, and then said the prisoner could not be found guilty of the assault unless it appeared that it was committed in the progress of something which, when completed, would be with the intent of committing a felony; therefore, unless the jury were satisfied the prisoner intended to rob at the time he assailed the prosecutor he could not be convicted. *Reg. v. Connor* was directly in point. An acquittal was directed by the Chief Baron, through Serjeant Murphy, because the death was not connected with the assault. In *Reg. v. Barnett* (2 Car. & K. 394), Mr. Justice Cresswell said the jury ought not to convict of an assault which was unconnected with the robbery. In all the cases there was not one in which the party had been convicted of an assault which was unconnected with the principal transaction charged. In *Reg. v. King* (2 Cox C. C. 95), Lord Denman had held differently from the other judges in the other cases.

WILLIAMS, J.—In the case of *Reg. v. Autey* (2 Cox C. C. 232), he had concurred with Baron Platt, and he believed the distinction in which he concurred was this:—If the prisoner was found in a transaction of killing by violence, and the evidence for the Crown showed that there was such a transaction, but that the prisoner was not one who was implicated, then he must be acquitted generally, although he may have been guilty of the assault upon the deceased, because then the assault was not a part of the imputed transaction; but if the evidence for the Crown failed to show that there was any such transaction as a death by violence, but that it was attributable to natural causes, but also that there was a transaction amounting to an assault, in which the prisoner was implicated, and nothing more, then the jury might convict of the assault, because the only transaction charged was proved, and the prisoner was shown to have been guilty of it.

The *Solicitor-General*.—There was a distinction in this case. Death there appeared to have proceeded from natural causes, and there was nothing beyond the assault. The charge terminated with the assault and could be carried no further. But in the pre-

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sent case they had the fact of a death by violence occasioned by somebody else; and it involved this question, whether if a man was indicted for murder, and it appeared that, instead of the assault he committed having occasioned the death that somebody else was guilty of the murder, you could find the prisoner guilty of the assault.

TALFOURD, J.—Suppose the order of proof had been inverted, and the medical men had been first called and proved the death to have been occasioned in some other way, then it had been conceded by the prosecution that they could not bring it home to the prisoners, the evidence of the assault would have been rejected?

The *Solicitor-General*. — Of course the judge would have stopped the case. In *Reg. v. Rooke*, it was proved that the ill-treatment had taken place many months before, but there was no evidence to connect the death with the violence, and it was proved that the deceased had died from natural causes, still Baron Platt held that the prisoners might be convicted of an assault. He was desirous of treating every decision with the greatest possible respect; but he owned he could not understand the principle upon which that decision was come to, because you might convict a man of an assault upon an indictment charging another offence, if it turned out that at some time or other the man had committed an assault. If it was wanted to show the mind and disposition of the accused towards the deceased—to show a grudge of old standing, and an assault was proved, but the prosecution failed to prove that the accused occasioned the death, could any one say that the jury could convict the party of an assault? What limitation would the court apply to the statute? Was not the true principle to be collected from all the cases—that a party might be convicted of an assault when the indictment involved a charge of violence, if the assault was immediately connected with the principal felony with which the prisoner was charged, so that, from a failure of proof of any of the circumstances to constitute the offence, the parties in one and the same transaction might be convicted of an assault? It was quite clear that the acts charged in this second indictment did not occasion the death, and therefore these parties were not before put in peril. The prisoners at the first trial had insisted that they could not be convicted of the murder because the assaults were not the cause of death but were disconnected with it. The statute said that, in cases of felony, where the evidence did not warrant a conviction for the felony, the jury might convict of an assault. But was it obligatory upon the jury to convict of the assault? or was it incumbent on the judge to direct the jury to convict of the assault? He apprehended not.

WILLIAMS, J.—Suppose an indictment for murder, and that the judge omitted to instruct the jury that the prisoner might be convicted of manslaughter, could he be afterwards indicted for manslaughter?

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The *Solicitor-General*.—The charge of manslaughter was involved in that of murder.

WILLIAMS, J.—A man is in jeopardy for any part of the offence charged in the indictment.

The *Solicitor-General*.—The act of Parliament says, that if a party be charged with a felony, and the evidence fails to prove it, but is sufficient to warrant a conviction for assault, he might be convicted of assault. Did that apply to a case where a party was charged with a series of assaults? If the jury could only convict of one assault, the prisoners would go free as to all the others. In the case of *Reg. v. Vandercomb* (1 Leach), for burglary and stealing, it was found that they could not convict the prisoner of stealing, and he was acquitted. They then indicted him for the burglary with intent to steal. He pleaded *autrefois acquit*. The judge said it was not the same offence; he had not been in peril for the same offence; he could not have been convicted before upon the same evidence. He submitted that the learned judge was right in his direction, and that the conviction was good.

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Slade, in reply.—The prisoner had stood his trial upon everything contained in the indictment; if he could have been convicted of an assault, he had been acquitted of it upon the first indictment. He admitted that the jury could not convict of an assault wholly independent of the felony, but he contended that these assaults were completely mixed up with it. This court was now called upon to overrule the decisions of Mr. Justice Allan Park, Baron Parke, Justices Cresswell, Coltman, and Coleridge, Lord Denman, Chief Justice Tindal, and Baron Platt; and for what purpose? Not for the purpose of reconciling conflicting opinions—not for the purpose of settling any great principle of law; but for the purpose of giving a different construction to the words of an act of Parliament to that which had prevailed ever since that act had passed. And why? For the purpose of punishing two miserable individuals who had already been sufficiently punished, who had been held up to public execration by the press, which in doing so had not spared the ermine of one of their lordships. For such a purpose this court was asked to overrule all these decisions. If the case had been argued before Mr. Justice Talford at the trial, and he had left the question of assault to the jury, and they had found the prisoners guilty, with what chance of success could they have come to this court with all these authorities against them except the solitary one of *Reg. v. Crompton*?

WILLIAMS, J. would put the case.—Supposing a woman indicted for murder of a bastard child, where the jury were at liberty to acquit of the murder and find guilty of the concealment, was the judge bound to leave the concealment to the jury, or could she be indicted for the concealment afterwards?

Slade.—It was difficult for him to say what the judge was bound to do. If the learned judge asked whether it was the judge's duty, he should say it was. The law assumed that every

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judge knew the law. So far as the peril of the prisoner went, it was not said that the judge had any discretion. The judge was not named in this act of Parliament; but only the jury.

WILLIAMS, J.—But is it his duty to leave it to the jury in all such cases?

Slade.—I am at his mercy. If a man with a drawn sword, and I am naked, stands before me, I am to expect he will run me through.

POLLOCK, C. B.—But if he does not wish to run you through. Is it not the duty of the judge?

Slade.—Yes; I think it is.

MARTIN, B.—Suppose the learned judge had left the question of assault to the jury, and they had found the prisoners guilty of the assault, could they afterwards have been indicted for an assault which did not conduce to the death?

Slade.—Not if it was included in that indictment; by an averment they could get out of it.

MARTIN, B.—Suppose that beating in the morning and beating in the afternoon caused death; the indictment included both beatings; the jury acquitted; the beating in the morning did not conduce to the death, but the beating in the afternoon did; could he be tried a second time for the beating in the morning?

Slade.—Certainly not. That is my case.

E. W. Cox in
reply.

E. W. Cox, for the female prisoner, replied.—His client had been in peril before. The Solicitor-General had said, here you have been indicted before, but you could not have been lawfully convicted, therefore you were not in peril. But the answer was, that the jury *might* have convicted if the evidence would have justified it, and they did not convict only because they were of opinion that the evidence did not establish the charge. Still they *might* have done so if they had pleased; it would have been a lawful conviction, and only the royal pardon would have relieved from the consequences. Therefore, they had been in peril. All these assaults were included in the first indictment, therefore the prisoners then stood in peril upon the very charges which were now brought against them. The judge was bound to put those assaults to the jury, and it was for the jury to say whether or not they believed the evidence of the medical witness as to whether these acts did or did not conduce to the death, and it was at the option of the jury to believe that evidence or not. They had a full right to disbelieve the surgeon, and to have acted upon their own view of the cause of death and held that those assaults did conduce to the death. Besides, what right has this court to assume that the jury acquitted because of the surgeon's evidence? The reasons for their verdict are not stated, and it may have been that they did not consider the assaults proved, or that they were justifiable assaults, or any capricious reason. The court cannot sit in judgment upon the verdict of the jury upon a question of fact.

TALFOURD, J.—The grand jury had not found the bill for the

assaults, they had found the bill for murder. The question was, whether these assaults were included in the first indictment?

E. W. Cox.—They were not only expressly charged in the indictment, but actually put in evidence in order to sustain the charge. Upon that point there can be no doubt.

POLLOCK, C. B., said, the court would take time to consider the case.

The Court having, intimated that there was a difference of opinion among the judges, and that it was desired that the question should be re-argued before all the judges, accordingly they appointed for that purpose,

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(Before CAMPBELL, C. J., JERVIS, C. J., POLLOCK, C. B., PARKE, B., MAULE, B., PATTESON, J., COLERIDGE, J., ALDERSON, B., WIGHTMAN, J., CRESSWELL, J., ERLE, J., WILLIAMS, J., TALFOURD, J., and MARTIN, B.)

Slade, having read the case (*ante*, p. 21) said, that he should now submit two propositions, and if he succeeded in either of them he should be entitled to the judgment of the court. The first was, that the true issue raised by the plea of *autrefois acquit* was not presented to the jury by the learned commissioner who tried that issue, but that he did in fact direct the jury to found their verdict upon another and altogether different issue, which was not raised by the pleadings, and that if the jury had been properly directed upon the issue as really raised by the plea, they must have been entitled to an acquittal. The other proposition which he should have the honour to submit was that which he had already argued at, he feared, tedious length, before five of their lordships in the Exchequer Chamber, namely, that by reason of the provisions of the statute 1 Vict. c. 85, s. 11, the prisoners might have been convicted of assault for the assaults which were then charged and put in evidence against them, and therefore were entitled to their plea of *autrefois acquit* when the same identical assaults were again sought to be charged and proved under a second indictment. (*a*)

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The prisoners were tried at the Spring Assizes for Devon for the murder of Mary Ann Parsons. The cause of death was stated in as many as six counts. He admitted that it was not necessary to prove all the assaults precisely as laid, nor was it necessary to prove the time at which it was stated they had taken place, but it was material to consider the mode in which the prosecutor had stated his charge, for the court would then be able to collect that these assaults were part of the very act and transaction which the Crown had prosecuted as a felony by the indictment. There could be no doubt that it was so, for it was not only so charged, but it

(*a*) The Reporter deems it right to acknowledge the fullness and accuracy of the report of this case in *The Times* newspaper, of which he has here made extensive use, finding that it was much more perfect than were his own notes. Indeed, it required very little alteration.

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was opened by the counsel for the Crown that they should rely upon the assaults as tending to prove the charge of murder. At the trial for murder these assaults were proved, and three were relied upon. The first was proved to have taken place on the 5th of November; the second at the end of November, or beginning of December; and the third on the 11th of December. No other assault was proved. On the second trial no other assaults were proved. The first trial proceeded at very great length, until it was necessary to call the medical evidence to prove the cause of death. The medical men swore that the cause of death was a blow upon the head, given apparently shortly before death, and, as there was a total absence of evidence to show whether either of the prisoners gave the blow, the prisoners were acquitted. This evidence of the medical men came upon the Crown completely by surprise, and the counsel were not prepared to argue whether the parties could be convicted of an assault. It was thrown out by the learned judge whether they could not be convicted of the assault. It became his duty, then, to submit that they could not, and he cited the case of *Reg. v. Crompton*, and there was an end of the question. There was no argument. The learned judge was to hold the balance between both parties, and when the counsel for the prosecution had no answer to give to that case, the learned judge had done right in ordering an acquittal. Since the trial they had had occasion to go through all the cases, which showed that *Reg. v. Crompton* was not conclusive. At the last summer assizes the prisoners were indicted for an assault, and that raised the question whether they could not have been before convicted of an assault. The prisoners put in a plea of *autrefois acquitt*, that the assaults included in the felony and murder charged upon them, of which they had already been acquitted, were the same as those charged in the present indictment. The replication was that they were not acquitted of the murder, including the same assaults charged in this indictment. No new assaults were proved. The learned judge (Mr. Gurney) called upon him to prove what were the assaults before proved. He produced evidence to show what had been proved on the first trial, and the prosecution called the surgeon to prove what was his opinion as to the cause of death, and that the assaults in question did not conduce to the death; and he, for the prisoners, contended that they were entitled to an acquittal upon the issue raised. The learned judge, however, directed the jury in these words—"I directed them, if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown." That was not the proper issue, nor the question the jury were to try. If the assaults had conduced to the death of the deceased, the prisoners were guilty of murder. The issue which the learned judge put to the jury was not raised by the pleadings, and it amounted to such a misdirection that the prisoners were entitled to the judgment of the court. The simple

issue should have been this,—whether or not the assaults now charged were the same assaults as those charged in the first indictment? The plea set forth a previous indictment for murder, and that the murder charged included divers assaults. A murder might possibly include divers assaults, and this indictment included those divers assaults which the prosecutor chose to charge in his indictment as causing the death. The plea then averred that the prisoners were acquitted of the murder including those very assaults, and then came the question of fact for the jury as to the identity of the assaults, and they were admitted to have been identical. The issue joined, then, was upon that fact, and, if that issue had been left to the jury, they must have found for the prisoners. But a different issue was left to them. If the Crown wished to raise a different issue, it should have been by pleading, and then the important question would have arisen, whether it was necessary, in case of murder or manslaughter, that an assault of which the party might be convicted under the statute must be an assault conducive to the death; but upon these pleadings that question could not be raised. This point was not argued the other day.

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TALFOURD, J.—That was one of the points powerfully put to us by Mr. Cox.

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MARTIN, B.—Yes; and it was a very important one.

CRESSWELL, J.—The question will be, whether you were acquitted before. Supposing Lord Denman's Act, enabling parties to be convicted of an assault, had never passed, of what then would you have been acquitted?

Slade.—Of everything contained in the indictment.

LORD CAMPBELL, C. J.—Before that act passed you would not have been previously in peril.

CRESSWELL, J.—You say now that you were acquitted, not only of the assaults which conduced to the death, but of all the assaults of which evidence could have been received upon this indictment, because you were in peril by reason of Lord Denman's Act, and the question is, whether you were in peril, and that depends upon another, whether the learned judge could have directed a conviction for an assault?

LORD CAMPBELL, C. J.—The matter turns upon the construction of that act of Parliament. If, upon the construction of that act of Parliament, the prisoners might have been convicted on the first trial of an assault, then, upon the second trial they would be in peril a second time if they might have been convicted on the first trial.

ALDERSON, B.—If they could have been convicted the first time no doubt they were in peril.

LORD CAMPBELL, C. J.—They could not have been convicted of the assault except under Lord Denman's Act. The question is, therefore, upon the construction of that act.

Slade.—That did not get rid of the first question, whether the proper issue had been left to the jury. He would now turn

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to the second proposition, that the prisoners, having been once in peril, could not be tried again for the same offence.

LORD CAMPBELL, C. J.—You have only to show that they were in peril the first time for the offence with which they were charged on the second occasion.

Slade.—That question would depend upon the proper construction to be put upon Lord Denman's Act, 1 Vict. c. 85, s. 11. That section was in these words, "that on the trial of any person for any of the offences thereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." He apprehended that did not mean an assault in fact, but where the nature of the crime was such that, in contemplation of the law, the assault would be against the person. Before that statute, probably, the acquittal for a felony, which included an assault, would not have been a bar to a subsequent indictment for an assault.

LORD CAMPBELL, C. J.—That is quite certain.

Slade said there was some difference of opinion as to the mode in which that statute was to be construed, and this might be traced to a note in Mr. Greaves's edition of Russel, p. 782. Learned as was the editor, he believed the note had not met with the general approval of the judges. He must now go through the cases as they had occurred, after the passing of this act in 1837. The first case was in 1838, *Reg. v. Ellis* (8 Car. & Payne, 654.) It was an indictment for highway robbery with violence. The jury found a special verdict: "We find the prisoner guilty of an assault, but without any intention to commit a felony." It was held that the special finding did not take the case out of Lord Denman's Act, and the prisoner was sentenced for the assault. That was decided by Mr. Justice Allan Park and Baron Alderson.

ALDERSON, B.—At one time I was of opinion that it depended upon the question whether the assault was charged as well as the other matters in the indictment, because I thought it was equivalent to finding so much of the indictment as amounted to a legal offence, though the crime was not charged as an assault; and at that time I thought it was not within the statute, because the party could not be found guilty of any part of the charge; but subsequently the judges had decided that the crime charged was that contained in the indictment, and if the crime included an assault, the party could be found guilty of an assault. Murder by poisoning did not include an assault, and therefore in such a case the party could not be convicted of an assault.

Slade.—The next case was before Baron Parke (1840), *Reg. v. Gutteridge* (9 Car. & Payne, 471.) That was a felonious assault upon a female: the felony was negatived, but there was a conviction for an assault. Baron Parke stated that in an indictment for felony the jury ought not to convict of a completely independent assault, but only of such an assault as was connected with the felony.

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LORD CAMPBELL, C. J.—Unless you allow a conviction where the act is done, but does not amount to a felony, I do not see where the benefit of the statute would arise, because, if it is a felony, the ends of justice are served without any such enactment.

Slade.—If the parties could not have been convicted of an assault in this case, there was no case in which parties could be convicted of an assault. He was not prepared to say, because an assault was charged in an indictment for felony, that therefore a person might be found guilty of a disconnected assault.

MAULE, J.—Such an assault could not be admitted in evidence; it would be irrelevant.

Slade.—The next case was *Reg. v. St. George* (9 Car. & P. 483.) A man had presented a pistol at another, which was not loaded; the question was, whether that was an assault? Baron Parke said his idea was, that the prisoner could only be found guilty of an assault involved in the commission of the offence with which he was charged. The felony was negatived, but he was convicted for the assault. The next case was a remarkable one, and had before escaped his attention. *Reg. v. Brimmilow* (2 Moody, 122.) It was felonious assault upon a female by a boy under 14 years of age, by law considered incapable of committing the crime. He was acquitted of the felony, but convicted of the assault. This was afterwards affirmed by all the judges.

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ALDERSON, B.—He could not commit the felony, therefore the assault could not have conduced to a felony never committed. Nevertheless he was rightly convicted of an assault, under the statute.

Slade.—That case proved his argument of misdirection. The assault could not conduce to the felony, because the felony could not be committed; and yet the boy was found guilty of the assault. The act of Parliament did not say, where the crime of felony included an assault, but where the charge included an assault. That was the decision of the fifteen judges, and was the law of the land, and, as such, had been acted upon. In *Reg. v. Poole* (9 Car. & P. 728), which was a charge of manslaughter, Baron Gurney said that, upon the evidence, the felony could not be sustained, but the prisoner might be convicted of an assault. That was exactly the case of the Birds; there was no evidence to show by whom the death was occasioned. The next case was in 1841, before the late Chief Justice Tindal, *Reg. v. M'Phane* (1 Car. & Mar. 212.) Three persons were indicted for cutting and wounding. The third man did not come up to the spot till the other two had gone away. Chief Justice Tindal held, that if the jury were not satisfied he had a felonious intent, they might convict him of an assault only. It was, therefore, not necessary that the assaults should conduce to the felony charged, although they must be connected with the crime charged.

ALDERSON, B.—That is the common sense view of the statute.

LORD CAMPBELL, C. J.—Do you say that, in an indictment for murder, any number of assaults may be given in evidence, and

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that a conviction would stand as to all of them, for instance, on assaults proved, with a view to show the *animus*?

Slade.—I am not sure of that.

PARKE, B.—Yes, if they be averred in the indictment as being a part of the offence of killing.

POLLOCK, C. B.—Do you contend that it turns upon the object with which the assault was given in evidence?

LORD CAMPBELL, C. J.—That would give to the prosecutor the power of convicting of an assault by showing that it was an assault which conduced to the death.

Slade.—My point is, if the assault was charged in the indictment as leading to the murder, and evidence was given of it, the prisoner might be convicted of that assault.

POLLOCK, C. B.—I want to know this, do you say it turns upon the object with which it is given in evidence? If given for a collateral purpose, then he would not be in peril; but if given directly with that object, then he would be.

Slade said that would depend upon whether it was charged in the indictment.

ALDERSON, B.—If it was such that the jury might have drawn the conclusion that it conduced towards death, then the man has been in peril for murder.

Slade.—He was in peril for the assault. If the prosecutor had not called the medical testimony, but had rested his case upon the other facts, no doubt the jury might have drawn the conclusion that the death arose from those assaults which were given in evidence upon the felony; but the plea of *autrefois acquitté* does not depend upon whether the proper evidence *was* adduced, but was proved by any evidence which *might have been* produced. In the case of *Reg. v. Shiel* the proper evidence was not produced. In the case of *Reg. v. Phelps* (1 Car. & M. 180), (1841), it was held, that in an indictment for murder a party could not be convicted of an assault committed in a previous affray, the assault being in nowise connected with the cause of death. The judges said, the assault must be one that formed a constituent part of the greater charge of felony, not of a distinct and separate assault. He would now come to the case of *Reg. v. Crompton* (1 Car. & M. 597), (1842), decided by Mr. Justice Patteson. It was a case of manslaughter of an apprentice, and the manslaughter was put an end to by the surgeon, who said the boy had died of consumption. It was submitted that he might be convicted of an assault. Mr. Justice Patteson said, "I think, in order to convict a person of an assault under this statute, it must be an assault which is the subject-matter of the charge, and would of itself be a felony but for some other cause; if otherwise, it would be easy in a case of manslaughter to convict a person of an assault which had nothing to do with it. I think no assault is included in manslaughter which does not conduce to the death, and therefore the prisoner is entitled to be acquitted altogether." That was the case he had cited before Mr. Justice Talfourd, who had acted upon it, and Mr.

Gurney, on the second trial, had adopted the very words. The next case was that of *Reg. v. Fulkes* (2 Moo. & R. 460), (1843.) In her trial for a felonious assault upon a child, the prisoner was acquitted of the felony, but convicted of the assault. The Chief Baron had expressed himself clearly of opinion that the conviction was proper. In *Reg. v. Bankes* Mr. Justice Maule had also given a strong opinion that a child consenting there was no assault.

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MAULE, J.—I rather think I have given two strong opinions, and different ones, too. I was rather disposed to think ultimately that a girl under ten could not consent.

Slade.—The next case was *Reg. v. Archer* (2 Moo. 282), (1843.) It was a case of felonious cutting with intent to murder; the prisoner was acquitted of the felony, but convicted of the assault. It came before all the judges, who held the conviction to be right. *Reg. v. Boaden* (1 Car. & Kir. 395), (1844), was before Baron Parke. In this case Mr. Greaves's note was alluded to. It was an assault with intent to rob. The jury negatived the intention to rob, and Baron Parke thought the prisoner could not be convicted of an assault under the statute; but he conferred with Mr. Justice Coleridge, and then said there might be a conviction for the assault, and Baron Parke said the conviction was warranted when the assault tended to the felony. He would ask, if Mr. Justice Patteson had this case, what chance the prisoner would have had in coming to ask to be relieved in consequence of a conviction for the assault?

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LORD CAMPBELL, C. J.—You would look to the evidence, and not to the opening of counsel, or it would be open for the prisoner's counsel to say, "Although you opened this as conducive to the offence of murder, yet it has no such tendency, and, therefore, there can be no conviction for an assault."

TALFOURD, J.—If the medical evidence had been called first, the evidence as to the assaults could not have been given at all.

LORD CAMPBELL, C. J.—The order in which the evidence was called cannot affect the question.

Slade would suppose that the Crown had rested their case without calling the medical evidence, and he had called them, could not the prisoners have been found guilty of an assault? The jury were not bound to believe the medical testimony, and, therefore, the prisoners had been in peril.

ALDERSON, B.—A man may be charged with murder by many acts; if he is acquitted of the murder, is he not acquitted of all the assaults connected with that charge?

Slade.—That is my proposition.

ALDERSON, B.—Am I right in supposing that the second count charged that the murder was committed by divers bruises inflicted on different days, between the 5th of November and the 1st of January? Are they now indicted for assaults committed between those days?

Slade.—Yes.

ALDERSON, B.—Then the same assaults were included in the first indictment.

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Slade.—Yes. In *Reg. v. Lewis* (1 Car. & Kir. 419), (1844), which was a case of manslaughter, no evidence was given to show that the death was caused by any act of the prisoners. Mr. Justice Coleridge said, if the felony included an assault, although the felony was not made out, the man might be convicted of an assault. *Reg. v. Birch* (1 Denison C. C. 185; 2 Cox Crim. Cas. 22; 2 Car. & Kir. 193), was the next and most important case. This was an indictment for robbery; the prisoners were convicted of an assault under the advice of Mr. Justice Patteson, but the point was reserved. Baron Parke delivered the judgment. The judges considered the prisoner properly convicted; they thought the enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases where the indictment for the felony on the face of it charged an assault; but they were of opinion that, in order to convict of an assault, the assault must be included in the charge on the face of the indictment, and be part of the very act or transaction which the Crown prosecuted as the felony by the indictment. In the present case, were not the assaults part of the transaction?

LORD CAMPBELL, C. J.—The medical evidence might not have been believed, and then the prisoners might have been found guilty.

Slade said, that the test was not only the evidence that was produced, but that which might have been produced.

ALDERSON, B.—I suppose the medical evidence went upon the ground that the death was solely to be referred to the blow.

Slade.—Yes. *Reg. v. Birch* had been the ruling case ever since its decision.

LORD CAMPBELL, C. J.—It is very materially in your favour when you show that these assaults were charged in one of the counts of the first indictment.

Slade.—The next case after that was in the same year, *Reg. v. King* (2 Cox Crim. Cas. 95), decided by Lord Denman. It also was a case of manslaughter; the death was proved to have arisen from natural causes, and that the blows had no influence in causing the death; but Mr. Cooke Evans suggested that the assault might be found. Lord Denman said, the question was, did the charge made include an assault? If it did include the assault, it seemed to be the opinion of the judges that if the fact should be proved, and the felony failed, but the assault was established, the case came within the statute, and the evidence of the assault must go to the jury. In his case the evidence was directed alone to these assaults. There was another case in the same book, *Reg. v. Auty* (2 Cox Crim. Cas. 282), tried before Baron Platt, and Mr. Justice Williams was consulted. The learned judge said he thought he was called upon to leave the question of assault to the jury.

ALDERSON, B.—You charge a man with assaulting and killing. He did assault, but he did not kill.

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Slade.—The next case was *Reg. v. Barnett* (2 Car. & Kir. 394); which was an indictment for robbery, but the robbery was disproved. Mr. Justice Cresswell decided that the jury might acquit of the robbery, but convict of the assault.

CRESSWELL, J.—Suppose they had averred that Mrs. Bird had inflicted the blow, and she had been found guilty of that blow, and then it would have been apparent the other blows were not connected with the death; the death by violence being the subject-matter of the indictment, could they then have convicted of the assault?

Slade.—Yes; if it was the same transaction.

JERVIS, C. J.—Can you convict several defendants of several assaults when the murder is a joint transaction?

Slade.—Perhaps there might be a difficulty. The last case was that of *Reg. v. Rooke*, an indictment for murder. The cause of death was proved to be inflammation of the lungs. Mr. Baron Platt decided that the jury could not convict of an assault, unless it was connected with the death, but he was of opinion the assault was included in the charge, and the person was convicted of an assault. He took the case from a report of the Central Criminal Court. (a) The act of Parliament did not say the jury might convict of “an” assault, but of assault. The Legislature had not imposed upon the jury the necessity of stating what assault.

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TALFOURD, J.—Then you say he might be found guilty of several assaults?

Slade.—Assault is *nomen collectivum*.

WILLIAMS, J.—Supposing upon this indictment there had been some additional evidence, and the prisoners were convicted of manslaughter, for causing the death, could you have pleaded *autrefois acquit* to that indictment?

Slade.—Certainly. Otherwise you might indict *ad infinitum*.

ALDERSON, B.—If a person is indicted for murder by one blow, which would not have caused the death of a strong person, you may show the ill-treatment which led to the weakening of the person; you may show the malice by the previous bad conduct.

Slade.—I submit, then, first, that the learned judge had pressed upon the jury an issue not raised by the pleadings, and second, upon the authorities cited, that it was totally immaterial whether the blows conduced to the death or not, and that, as they had been part of the transaction charged, the parties had been in peril for those assaults at the first trial.

MAULE, J.—It is uncertain how the deceased died. She is dead—but you cannot tell how—it is difficult to say that they could not have been convicted of an assault.

LORD CAMPBELL, C. J.—Suppose the jury had disbelieved the medical evidence, they might have found them guilty; then it is difficult to say they were not in the peril of this assault, because,

(a) It has since been reported in these reports (see 4 Cox's Crim. Law Cas. 400.)

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if they might have been convicted of the assault included in the murder, they might have been convicted of the assault when murder was no longer part of the charge. You say the direction on their second trial should have been whether those assaults were included in the first indictment. If so, they were in peril, although the charge of felony might not have been completely made out.

Slade.—A felony of this description includes an assault in point of law. He submitted he had shown that there was a misdirection, and that the prisoners had been a second time put in peril, and he therefore prayed the judgment of the court in their favour.

E. W. Cox was about to address the court for the female prisoner.

LORD CAMPBELL, C. J.—The court can only hear one counsel.

E. W. Cox.—We appear separately for the prisoners.

ALDERSON, B.—Did they sever in their plea?

E. W. Cox.—No; it was a joint plea.

LORD CAMPBELL, C. J.—Then they are not entitled to appear by separate counsel here.

E. W. Cox said it was allowed in *Frost's case*.

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LORD CAMPBELL, C. J.—There the prisoners pleaded severally. This question was decided in *O'Connell's case*. We cannot hear you.

E. W. Cox could only, then, put it to the court as a favour under the special circumstances. He had been heard without objection on the previous argument, and not anticipating an objection now, the same division of the argument had been made by arrangement now as then, and he was not going to travel again over the same question. He had to submit quite a different point.

Their lordships having consulted,

LORD CAMPBELL, C. J.—Under those circumstances the court will hear you. But you must confine yourself to the single argument to which you allude.

E. W. Cox.—Mr. Slade's argument has turned entirely upon the construction of the statute. He had now to submit that the prisoners were entitled to an acquittal upon their plea, independently of the statute.

ALDERSON, B.—Do you mean that it would have been so before the statute?

E. W. Cox.—Yes. He was prepared to maintain that, upon the general law of *autrefois acquit*, the prisoners having been, in fact, tried and imperilled, could not be again tried for the same act or transaction, whatever the legal name affixed to it. An acquittal for manslaughter was a bar to an indictment for murder, and *vice versa*, although they were different offences in law; and an acquittal for burglary with violence was successfully pleaded in bar to an indictment for murder. Why? Because the same *act* of the prisoner had been once investigated, he had been tried for it, and

might have been lawfully convicted of it. The mistake lay in confusing a question of evidence with a question of law. If the act charged as an offence can be put in evidence at all, the jury may convict upon it *lawfully*, and however unsatisfactory to the reason such a conviction might be, it would be good in law, because it was within the province of the jury, and there would be no remedy but the royal pardon. If, then, the jury might lawfully convict, however unreasonable such conviction might be, the prisoners are in peril. Here they might have convicted, if they had pleased, even against the direction of the judge, and that would have been a lawful conviction.

CRESSWELL, J.—But this is an indictment for a misdemeanor, and *autrefois acquit* of a former felony cannot be pleaded to that.

E. W. Cox.—There is no authority for this general assertion of the books. The case in *Strange*, upon which it is said to be founded, does not in any way justify such a conclusion, and it is contrary to the principle of *autrefois acquit*.

ALDERSON, B.—You say, then, that the practice of centuries is wrong, for the judges continually direct an indictment for the misdemeanor after an acquittal for the felony. You say that in such cases *autrefois acquit* might be pleaded.

E. W. Cox.—Yes, if the very same *act* was charged in the second indictment as in the first. But this seldom happens, for usually it is for a distinct act and offence, as for attempting to commit a felony and such like, which involves something more than the mere act charged in the first indictment. If it were not so, the monstrous consequence follows, that where a manslaughter is charged by a long series of beatings, the prisoner might be convicted and punished for the manslaughter, and then indicted and punished for each of the beatings.

LORD CAMPBELL, C. J.—No. The misdemeanor would be merged in the felony.

E. W. Cox.—Only so much of the whole transaction as actually produced death. If the reading of the statute contended for by the Crown is right, the consequence suggested would result. The injustice of it would be obvious in case of a conviction, but the argument was in law equally applicable in case of an acquittal. But he would not press that now. Then, even if the statute alone is to determine this question, he contended that, apart from any construction of the limit of its application to assaults connected with the charge of felony which the court might entertain, the prisoners were entitled to *autrefois acquit*.

LORD CAMPBELL, C. J.—You are travelling into Mr. Slade's argument.

E. W. Cox.—No. He was contending that, as a consequence of the statute, apart from any differences as to its *meaning*, the prisoner had been in peril. The argument was very short, but it seemed to him conclusive. The statute gave to the jury, and to the jury alone, the power of finding the prisoners guilty of assault. It did not say, "if the court shall direct," but "it *shall be lawful*

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for the jury, "if the evidence shall warrant such finding"—that is, if in *their* opinion, as a question of *fact*, it shall do so. Now the statute having vested this power in the jury, whether so directed by the judge or not, and even against his direction, if they pleased, they *might* exercise the power so given to them, and coming to the opinion that the evidence did warrant such a conclusion, find a verdict of assault. In this case the assaults in question were in evidence; the jury might, if they had chosen to do so, have used the power given to them by the statute, and said that the evidence did warrant them in finding the prisoners guilty of assault, and might lawfully have convicted them of it accordingly; and, therefore, inasmuch as the jury might then and there have lawfully convicted them, they have been, in fact, in peril for those assaults, and are entitled to their plea of *autrefois acquit*.

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Rowe, Q. C., with whom was *Karslake*, contended for the Crown, that the conviction must be confirmed. He agreed that if the prisoners could have been legally convicted of the assault of the 10th of November, on the first trial, they could not a second time be tried for the same assault, but he contended that they had not before been acquitted of that charge, and could not legally have been so acquitted, and therefore they had not before been in peril. It must be identically the same transaction, identically the same peril. He would first address himself to the construction of Lord Denman's Act. The way in which the case had been opened to the jury could not be a test as to the construction to be put upon this statute. Mr. Gurney, at the foot of the case, had stated the circumstances under which the case was opened to the jury in March. The counsel said, if he should fail in proving that these assaults were included in the principal charge of murder, he should nevertheless insist upon these assaults as proving the *animus* of the case. It was first material to show of what these parties were acquitted in March.

LORD CAMPBELL, C. J.—They were acquitted of all those things of which they might have been convicted, therefore it is material to see of what they might have been convicted.

Rowe would ask what was the meaning of the words in the statute "of the crime charged?" It must mean the crime as averred on the face of the indictment.

ALDERSON, B.—Does not the crime charged necessarily include the assaults, although they are not expressed?

Rowe.—The charging the crime on the face of the indictment has little to do with the matter; those who framed the statute contemplated a class of felonies in themselves, *vi termini*, involving an assault, as the minor proposition included in the major.

LORD CAMPBELL, C. J.—A murder may involve several assaults. Suppose the statute had been thus: upon the trial of any person for any of the offences herein mentioned, which crime shall include an assault, it shall be lawful to acquit of the felony and find the parties guilty of an assault. Several assaults are charged upon the indictment as included in the murder; if the statute had

been framed so, might not the prisoners have been acquitted of the murder, and found guilty of those assaults?

Rowe apprehended not. The object of the statute was to enable the jury to act under the direction of the judge, when the judge might consider it his duty to direct the jury particularly upon the question of assault. It was clear that an indictment for rape was good, although there was no allegation of an assault.

LORD CAMPBELL, C. J.—It is unnecessary to charge an assault, because it is utterly impossible to commit the crime without an assault.

MAULE, J.—Murder can be committed without an assault.

ALDERSON, B.—It does not include an assault necessarily.

PARKE, B.—To avoid any discussion of this sort, Mr. Baron Bolland and myself, the first circuit we went after the passing of the statute, directed the clerk of assize to introduce the assault into the indictments.

Rowe.—The averment of an assault would not bring a case within the statute which was not within the statute before. In the case of *Reg. v. Dilworth* (2 Moo. & Rob. 531), the evidence established the fact that the mode of poisoning was by forcibly assaulting the party and putting the poison into the mouth. The felony was not proved, and it was submitted that the prisoner might be convicted of an assault; but Mr. Justice Coltman said it was not within the statute, and there was no averment of an assault upon the face of the indictment.

ALDERSON, B.—Suppose the indictment had charged an act of omission, and had said he made an assault, and it was proved that the charge of omission had failed, could the man have been convicted of slapping the other's face?

Rowe.—I apprehend not.

MAULE, J.—This is an indictment for murder by blows. Do you conceive that this is an indictment which does not charge an assault within the meaning of the statute?

Rowe.—The averment in the indictment was not the test. If a murder was effected by a blow, whether there was an averment for an assault or not, it was immaterial.

MAULE, J.—Is it the consequence of that immateriality that such a case is not within the statute?

Rowe.—The blow struck was the actual assault involved in the major proposition of the felony, and then he could not be tried again for that assault.

MAULE, J.—Then you hold that the crime charged in this indictment includes an assault?

Rowe.—No doubt.

MAULE, J.—The indictment charges that the blows were given, and killed the girl; and the question was, whether that was the assault or not?

Rowe.—A different assault was not within the statute.

MAULE, J.—When you want to know what the charge is, you must look at the indictment.

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Rowe.—Not so, but to the evidence. The indictment is in general terms, and the prosecution is not bound by averment of time or place.

LORD CAMPBELL, C. J.—If you want to know what the charge is, surely you must look at the indictment.

MAULE, J.—You say that, if you look at an indictment, and I say, does the crime charged include an assault? the answer is, "I cannot possibly tell."

Rowe.—The indictment is not the test.

ALDERSON, B.—Here the second count charges a great number of assaults; do you mean to say that this was not an assault charged?

Rowe.—Not within the meaning of the statute. In the case of *Reg. v. Watkins*, which was a burglary with intent to commit a rape, an assault was set out on the face of the indictment. It was held that the case was not within the statute.

ALDERSON, B.—Because the whole crime was the breaking and entering with intent to commit a rape.

MAULE, J.—According to your statement, you could not have found anything from that indictment; you mean to say, sometimes you can and sometimes you cannot?

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Rowe apprehended it was so. An averment of an assault proved nothing one way or the other. It was essential, not only to look at the words of the indictment for the crime charged, but to go further. The statute provided for any crime, where the crime charged included an assault, that the jury might then acquit of the felony and convict of the assault.

MAULE, J.—What are the jury to consider that the crime charged means?

Rowe.—They are to hear what the judge says about it.

WIGHTMAN, J.—Where is the judge to look for it?

Rowe.—The learned judge in *March* was of opinion that the question of assault could not be put to the jury when the evidence failed as to the felony, in which he entirely concurred. He put it to the learned judge that there was evidence of an assault; they were acquitted of the capital charge because there was no evidence that one or the other struck the fatal blow, therefore there was no evidence to go to the jury. As to the assault, he had suggested there was evidence for the jury.

TALFOURD, J.—The suggestion proceeded from you. You said, "Cannot they be found guilty of an assault?" I think I said, "Was there any evidence of a joint assault? These are separate assaults." You referred to some one of the strongest of the cruelties practised on this unfortunate girl. I said that would not be a joint assault, unless by both, and then *Slade* rose with the case of *Reg. v. Crompton*. You acquiesced, and said, "We have done all we can." That, I think, is what took place.

Rowe felt it his duty to suggest that there might be a case of assault; but *Reg. v. Crompton* put an end to the case; he acquiesced, believing, as he still did, that it was correct law. Two difficulties had suggested themselves upon this statute; the one had been

raised by Mr. Greaves's note, and the other was to how far an assault not immediately connected with the capital charge could be left to the jury? He apprehended that, upon that point, the cases down to *Reg. v. Birch* were conclusive.

LORD CAMPBELL, C. J.—Is not the assault included in the crime charged in the case of murder, where a prisoner is charged with maliciously giving another mortal blows and committing murder, and it turns out that the blow was given, but that a murder was not committed, for that the supposed deceased is present at the trial; would not that assault be involved in the crime charged?

Rowe.—Not if that assault was shown to have nothing to do with the main fact.

MAULE, J.—You do not mean to say that it is necessary that the death should take place? You cannot mean that unless a felony is committed, you cannot convict of an assault.

Rowe would refer to the case of *Reg. v. Connor* (2 Car. & Kir. 518.) There an acquittal was directed because the death was not connected with the assault.

LORD CAMPBELL, C. J.—Unless we saw the indictment we could not say how far the cases were similar.

POLLOCK, C. B.—A person is charged with an assault which for a moment is supposed to have conduced to the death, and he is charged with murder, and, upon examination, it turns out that he had nothing whatever to do with it, that the death proceeded from natural causes, and great injustice had been done to the prisoner to charge him with murder at all; that does not apply to a case where the charge is that you have produced the death of this person by a series of assaults, and the charge is made out with the exception of proving that the death was caused by them. It turns out that it may have been that the deceased died from a blow which might have been inflicted by both or one of the prisoners, but there is no evidence to prove it; it is a failure of evidence. If the jury believed it had been inflicted by one of the prisoners, but there is no evidence by which, that was the reason why the acquittal took place, the matter would have been more clear if the surgeon had said, "The young woman died from no assault, but from some other cause."

Rowe thought the facts very similar.

ALDERSON, B.—Was this caused by the different assaults or by the one? If the latter, then it is not proved whether the prisoners committed it; if the former, you ought to convict. Surely they have been in jeopardy before.

LORD CAMPBELL, C. J.—The learned judge stopped the trial, and he is supposed to have put the whole question to the jury, and their verdict is given.

Rowe.—The learned judge was of opinion that the jury could not take cognizance of the assault.

LORD CAMPBELL, C. J.—It was more a matter of fact than of law, because, if it had not been for the medical evidence, the learned judge would have left it to the jury.

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ALDERSON, B.—Suppose one medical man had assigned the death to one cause, and another to another, it must have been left to the jury.

Rowe.—Beyond all doubt. The prisoners' counsel said, in point of law, you cannot put the assault to the jury.

JERVIS, C. J.—How does that alter the legal liability of the parties?

Rowe submitted that they were disconnected by the evidence, and if the evidence had been doubtful, the judge would have been bound to leave the case to the jury; but, as there was no doubt, the learned judge acted accordingly. He did not mean to say that if the learned judge acted erroneously the plea of *autrefois acquit* would not lie, but he considered the learned judge was perfectly correct in what he did.

COLERIDGE, J.—Suppose the medical evidence to be this,—we are quite satisfied that the falls did not cause the death, but we do not know what did, and the jury had acquitted; after that could they have been indicted for the assault?

ALDERSON, B.—Suppose the judge had summed up the evidence of two opposite medical witnesses?

Rowe admitted that, if the evidence had been conflicting, then the prisoners would have been in peril. The assaults were disconnected at that time, and the learned judge would not have been justified in leaving the jury to come to a conclusion upon any one of these acts. The learned counsel then reviewed *seriatim* the cases cited by the counsel for the prisoners, and urged that the prisoners had not before been in peril. It was the duty of the judge to say that these assaults did not conduce to the death, and, therefore, were not within the cognizance of the jury upon that indictment.

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COLERIDGE, J.—He could only say that upon the evidence of the surgeons, and that was for the jury. It was not a matter of law. It was for the jury.

Rowe contended that these parties were not in March put on their trial for the assaults for which they were indicted in the autumn; the moment the evidence showed that the assaults had nothing to do with the death of the girl, then those assaults were irrelevant altogether, and the party was never in peril, and therefore might be tried again.

MAULE, J.—I suppose you say that, although the statute enables the jury to convict, yet that it is not compulsory upon them to do so?

Rowe.—It was not compulsory on the learned judge to put the question of assault to the jury. He also urged that there was no misdirection on the part of Mr. Gurney. Under all the circumstances, he submitted the prisoners had been properly convicted of the assaults.

PATTESON, J.—If one of the prisoners had been found guilty of the murder, and the other of the assault, as, according to your argument they might have been, how, and in what form, could a

verdict of guilty of an assault have been entered on the first indictment?

Slade did not know how the officer would have entered it.

E. W. Cox.—By a general verdict of guilty against one, and a verdict of assault against the other.

The Court took time for consideration.

JUDGMENT.—*February 12.*

MARTIN, B.—At the Exeter Spring Assizes, the prisoners were indicted for the murder of Mary Ann Parsons. The indictment contained six counts. The first charged the murder by striking with a stick; the second, by divers beatings between the 5th of November, 1849, and the 1st of January, 1850; the third, by beating on the 5th of November and the 1st of December, 1849, and the 1st of January, 1850, and on divers other days between the 5th of November and the 1st of January; the fourth, by blows inflicted with a scourge, and the fifth and sixth by casting her on the ground. At the trial of the indictment, the counsel for the prosecution opened all the above assaults as conducing to the death, but stated that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners. It was proved at the trial that the death (which took place on the 4th of January, 1850) was caused exclusively by one particular blow on the head, and there being no evidence that this blow had been struck by either of the prisoners, they were acquitted. At the last Exeter Summer Assizes the prisoners were indicted for the misdemeanor of having assaulted Mary Ann Parsons. The prisoners pleaded *autrefois acquit*, which was traversed. The record of the former trial was put in evidence, and it was proved that evidence had been given thereat of different assaults committed by the prisoners upon the deceased, throughout the months of November and December, 1849. One on the 5th of November, with a stick, another at the end of November or beginning of December, also with a stick; and another with a furze bush, about the 11th of December; and it was not proved at the second trial that there were any other assaults committed but those which were given in evidence at the first trial. The learned judge directed the jury that if there were several distinct and independent assaults, some or one of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown. Upon this direction the jury found a verdict for the Crown, and the learned judge stated a case, containing the foregoing statement, for the opinion of this Court. The substantial question now to be decided is, whether upon the trial for the murder the prisoners could lawfully have been convicted of these assaults under the 11th section of the statute 1 Vict. c. 85, for it was conceded by the counsel for the Crown, that if they could have been so lawfully convicted, they cannot be tried a second time for the same assault, the principle of law being that a person cannot be more than once put in a peril of the same character for the same act or acts. I am

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of opinion that they could have been so lawfully convicted. The section enacts, "that on the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The true rule for the construction of a statute in my opinion is that laid down by Mr. Justice Burton, in *Warburton v. Loveland*, and stated by Mr. Baron Parke, in 2 Meeson & Welsby, 193—that courts ought to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, and no further. Now, to apply this rule to the present case. The first trial of the prisoners was for a felony. The crime charged, viz., murder by violence, included in the several counts of the indictment, assaults against the person; the evidence of these assaults was lawfully given and received in alleged proof of the murderous deed. The jury acquitted of the felony, and the evidence, in point of fact, clearly warranted the finding the prisoners guilty of assault, and so also in law, inasmuch as there was no lawful excuse or justification of them. The case, therefore, seems to me to fall within the very words of the statute. Then, is this construction at variance with or repugnant to the intention of the Legislature, to be collected from the statute, or does it lead to any manifest absurdity? It seems to me that it is in conformity with the intention of the Legislature, so far as I can collect it, and I am not aware that any one has contended that it is absurd. The statute was to amend the laws relating to offences against the person. At common law a misdemeanor could not be joined in the same indictment with a felony, and the consequence was that in all cases of alleged felonious offences against the person, if the prisoner was acquitted of the felony, he was free altogether upon that indictment, and a fresh indictment was necessary in order to bring the offender to justice. The object of this enactment was to prevent the necessity and make provision for the conviction and punishment of the offender in the then present trial; and it seems to me that the object and spirit of the enactment is to enable the guilty person, although he be acquitted of the felony, to be at once convicted and punished for the assault, if he be charged with it in the indictment. If the construction contended for by the counsel for the Crown be the correct one, and the assault must conduce to the death, the consequence seems to me inevitable that, in all cases of alleged murder or manslaughter, there cannot be a conviction for an assault at all under the statute, for if the assault conduces to the death, the party whose assault is so conducive must either be guilty of murder or manslaughter, or his assault must be a justifiable act. It would be absurd to contend that a justifiable act would be an assault within the meaning of the section, and

therefore it seems to me the argument for the Crown must go the length of contending that the statute does not apply to cases of murder or manslaughter at all. I do not go into cases of other felonies, although I believe the same consequence will legitimately follow from the same line of reasoning, and the statute would (if it be correct) be wholly inoperative. But I do not think this is the correct construction of the statute, and in my opinion the true criterion is—is the assault, in point of fact, charged upon the face of the indictment, and is it part of the act or transaction which the prosecutor gives evidence of as conducing to the felony? If it falls within these two categories, in my opinion the prisoners may be lawfully convicted of it by virtue of the statute. Take the third count of this indictment, that is the count for beatings on the 5th of November and 1st of December, 1849, and the 1st of January, 1850, and on divers other days between the 5th of November and the 1st of January. Suppose there had been no evidence of the particular blow which is said to have caused the death, and the jury had not been satisfied that these blows (which it seems to me are specifically stated in this count) had caused the death, but the case had been left to them by the judge as a fair case for them to exercise their judgment upon; if these blows conducing to the death, the prisoners were guilty either of murder or of manslaughter, but if they did not conduce to the death, according to the argument for the Crown, the jury ought to have been told that they could not find them guilty of the assault. It seems to me that the statute was intended to meet this very case, and if so, I think the proof of the particular blow that caused the death cannot alter it. Again, suppose the evidence of the particular blow had been given on behalf of the prisoners, as it was a fair question of fact for the jury whether the violence by the beatings, or by that blow caused the death, this seems to me to be directly within the statute, and it cannot, in my judgment, make any difference on behalf of which party the evidence was given at the trial. On the argument a great number of cases were cited, but there are only three to which I think it necessary to refer, viz., the cases of *Reg. v. Phelps*, *Reg. v. Crumpton*, which were principally relied on by the counsel for the Crown; and *Reg. v. Birch*, which was principally relied on by the counsel for the prisoners. *Reg. v. Phelps* was tried at the Summer Assizes, 1841, and the report states that the first count of the indictment charged the prisoners as principals in the first degree for the murder of John Overbury, by striking and beating him. The second and third counts charged Phelps as principal, and two others as principals in the second degree, in the following form:—"That the said Southan and Smith (the two other persons in the indictment with Phelps), at the time the felony and murder was committed, were feloniously present abetting, aiding and assisting the said John Phelps." The statement of the evidence is, that as the deceased was going away from a public-house Phelps struck him several times, and he was afterwards killed by violence, and the evidence went to show that the prisoner Phelps had gone away before the violence which caused the death was inflicted.

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The charge of murder, therefore, failed, and the prisoner Phelps was found guilty of an assault. The counsel for the prisoners objected that Phelps could not be convicted of the assault, as the assault was totally independent of the felony. It was urged by them that it was only when the assault is included in the felony charged that a conviction for an assault can take place. There the case was the same as if Phelps had struck the deceased, and afterwards some person wholly unconnected with Phelps, and not knowing that he had struck the deceased, had killed him after Phelps had gone away. Mr. Justice Coltman reserved the point, and the judges were of opinion that the conviction for the assault was wrong. I think this case distinguishable from the present; according to the report the indictment does not charge the prisoner with beating the deceased, specifying with particularity and precision certain beatings alleged to have been given, and drawing a conclusion that thereby the death was caused, but rather seems to charge as the beatings those only by which the death was caused. Now, if this be the true construction of the indictment, the decision is exactly conformable to my view of the right construction of the statute; for the beatings charged in the indictment would be the beatings which caused the death—beatings with which Phelps had nothing to do, and therefore the beatings which Phelps inflicted were not charged in the indictment at all; and if so, in my opinion, he could not be lawfully convicted of them. But in the present case the beatings which are charged in the indictment for the misdemeanor are the same identical beatings which were charged in the indictment for the felony, stated and here marked as it were with certainty and precision. In the latter indictment, it is true, a false conclusion, in fact, is alleged; viz., that they caused the death which they did not. But they were charged in the indictment as the cause of death; and, as I have already said, in my opinion, it was competent for the jury to find the prisoners guilty of these beatings and to acquit them of the felony. If, however, the indictment did charge the specific assaults committed by Phelps, I can only say that the judgment seems to me to be at variance with the subsequent case of *Reg. v. Birch*, which I consider a better authority, and in point with the present. *Reg. v. Crumpton* was tried at the Spring Assizes, 1842, and the first count of the indictment charged that the deceased was the apprentice of the prisoner; that it was the duty of the prisoner to suffer and permit him to take such proper exercise as was necessary for his bodily health, and to find and supply him with proper and necessary nourishment, medicine, medical care and attendance; and that the deceased, being weak in body, the prisoner struck and beat him, and forced him to work for an unreasonable time, and would not allow him to take proper exercise and recreation, and neglected to supply him with proper nourishment and medicine, medical care and attendance, by means whereof he died. The second count charged that the deceased being such an apprentice, the prisoner feloniously did make an assault on the deceased, and being weak in body, the prisoner forced him to work for unreason-

able and improper times, and beat him; by means whereof he died. The evidence was, that the prisoner was a tailor, and the deceased was his apprentice; that the latter had been in ill health for a year before his death, and had a bad cough, and was kept at work on some occasions from six o'clock in the morning until eight or nine in the evening; and that, about five weeks before his death, the prisoner beat him with a small cane. That about three weeks before his death he left the prisoner's house and went to his grandfather's, where he died; and the surgeon, who made a *post mortem* examination, stated that he died of consumption; that over-work and ill-usage might have accelerated his death, but he was not able to say that it had done so; he stated, also, that there were some bruises on his legs, but they could not at all have contributed to the death. It was urged that the prisoner might be convicted of the assault. Mr. Justice Patteson is reported to have said:—"I think that in order to convict a person of an assault under the statute, it must be an assault which is the subject-matter of the charge, and embodied in the charge, and which would itself be the felony, but for some other cause." Now this, in my judgment, is the true construction of the statute as it is; because the assaults in the present case were the subject-matter of the charge, and embodied in the charge; and if the death had arisen from them they would have been the felony; therefore, I am of opinion that the case is within the statute. But the learned judge goes on to say:—"I think no assault is included in a charge of manslaughter which does not conduce to the death of the deceased, although the death itself be manslaughter;" and as the surgeon disconnected the assault from the death, he directed an acquittal altogether. Upon the best consideration I have been able to give to this question, I cannot concur in this latter part of his lordship's judgment. The conducing to the death does not, in my opinion, form the rest. In *Reg. v. Birch*, which was tried at the Spring Assizes, 1846, the indictment charged the prisoner with an assault and a robbery of a watch and money. The person supposed to have been robbed did not appear at the trial; but witnesses, who saw the transaction, proved that the prisoner struck the person named in the indictment. The jury stated they were not satisfied that there was any intent to rob, and they found the prisoner guilty of an assault. Mr. Armstrong, who tried the case, after consultation with Mr. Justice Patteson, reserved the case for the opinion of the judges; and upon that occasion they gave an exposition of the statute. It is thus stated in 1 Den. p. 186:—"The enactment is not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony; nor is it to be extended to all cases in which the indictment for a felony on the face of it charges an assault. In order to convict of an assault under the section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment." It is thus stated in Carrington & Marshman:—"The opinion of the judges

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was, that the statute applies whenever the indictment charges an assault, and the jury, negating the felony, finds guilty of the assault; provided always, that the finding be in respect of the very same acts which the Crown seeks to make felonies. Identity being the question, and not the intention of the prisoner to commit felony, otherwise the statute would not apply to the ordinary cases of wounding with intent," &c. In my opinion this is the correct exposition of the statute. But even supposing I did not concur with this judgment, it seems to me it would nevertheless be my duty to submit to it. It is the unanimous judgment of the judges upon the point given judicially upon the construction of the statute; and if such a judgment is not to be held conclusive, I am at a loss to know how certainty in the law can be attained. I do not mean to say that if the very improbable case occurred of an unanimous judgment being clearly and obviously and manifestly wrong and absurd, I would consider myself absolutely estopped from exercising my own reason and judgment in respect of the point decided; but what I mean is, that if there be an unanimous judgment upon a point of difficulty and nicety, upon which a difference of opinion might have reasonably existed, and did exist before such a judgment, I think after such judgment I ought to be bound by and act upon it, and consider the matter to be settled and at rest. In my opinion this judgment directly applies to the present case, and ought to be conclusive upon it. As I am therefore of opinion upon the substantive question that the prisoners were by law entitled to have the verdict found for them upon the issue on the plea of *autrefois acquit*, I do not think it necessary to give any opinion upon the other two questions raised by the counsel for the prisoners.

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TALFOURD, J.—I am of opinion that the conviction is right; that this plea of previous acquittal was not and could not be sustained; and that the charge of the learned judge who tried the issue joined on that plea, presented to the jury the only question, which, if decided in favour of the prisoners, could have entitled them to judgment. On behalf of the prisoners two points were argued, and most ably argued at the bar, first, that the prisoners might have been equally convicted of the assault which formed the subject of the indictment for misdemeanor on the previous indictment for murder; and secondly, that the learned judge at the trial of the issues on the special plea, misdirected the jury. The first and main question turns on the construction of the statute which, for the first time, enabled juries to convict of common assault in an indictment for felony. That statute was passed "to amend the laws relating to offences against the person," and, repealing antecedent acts, it proceeds to define the punishment of several offences of the description which its like indicates, and it is not immaterial to the true construction of the clause which refers to these offences, to bear in mind their character. These are attempts to murder, by various means stated, producing wound or bodily injury, which are made punishable with death—the attempt

to administer poison, the act of shooting, the attempt to discharge loaded arms, the attempt to drown, suffocate or strangle, with intent to murder, though no bodily injury be produced, which are made felony and punishable with transportation. Similar acts committed with intents short of murder, made punishable also with transportation, and other felonies which do not necessarily involve violence. All these crimes are, in their nature, single definite acts: not results from several acts, each act itself being a substantial felony. The 11th section of the 1 Vict. c. 85, enacts, "that on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatsoever, where the crime charged shall include *an assault* against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of assault against the person, if the evidence shall warrant such finding." The consequence of such a verdict of guilty of assault may be imprisonment for three years with hard labour, and solitary confinement for a month at a time, not exceeding three months in any one year, at the discretion of the court. Two questions arise upon this clause: What is the meaning of "the crime charged?" and what is the case in which "the evidence shall warrant the finding" of guilty of assault against the person? By "the crime charged" I understand the act of felony of which the prisoner is accused, and for which he is tried, and which, by the practice of the law well settled long before the statute, can only be a single felony, and in the case of murder must be, of physical necessity, single, when applied to one person. The "crime charged" has, in my judgment, no reference to the various statements which, at his will, in various counts, the prosecutor places on the record, but to the *corpus delicti* for which alone, though variously stated, the prisoner can be required to answer. Considered with relation to the context, the meaning of this phrase is obvious, that whereas some of the offences "before mentioned" in the act *do* include an assault against the person; as rape or stabbing, and others *do not* include it, as the attempt to procure abortion, or the administration of poison, the statute applies its provisions to the former class of crimes and other felonies the like in character. To support the construction that the "crime charged" means the crime as varied, and presented as many crimes on the face of the indictment, the words should have been "crime *as* charged." It is further to be observed that, it is not necessary to state in the indictment that the party accused "made an assault," where the offence necessarily implies violence, as has been decided in the case of rape (*Allen's case*, Moody's Crown Cases Reserved, p. 179), and will be found illustrated by the greater number of precedents of indictments for murder by violence in the second volume of Chitty's Criminal Law. The crime of murder is comprehended in the terms "any felony whatsoever," and therefore if there is any case of murder to which the statute can be practically applied, it may be so applied; but considering that the statute enumerates many felonies of inferior atrocity to murder, of which the attempt to

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commit murder is the highest, all single acts to which the application of the statute is easy. I do not believe it was in the contemplation of the Legislature to include under the word "felony," cases of death, which are not cases of mere act, but of act followed by a consequence. Without, therefore, meaning to affirm that the case of murder cannot be brought within the statute, by reason of the insufficiency of its language, I think no argument will be supplied against a construction which excludes the case in judgment, if it should follow that few cases—or even no cases—of felony involving death would be practically within the operation. The next question, arising on the meaning of the words "where the evidence shall warrant such finding," is, when does the evidence warrant a finding of assault on an indictment for felony? The answer I offer is, when the very assault which the crime includes, and which, either by reason of the non-completion of a purposed felony, or the absence of intent imparting to the assault a felonious character, though proved by the evidence, is also, by the evidence, shown not to amount to felony. The words "an assault," in the first member of the clause, and the word "assault" in the last member of it, are correlative terms; they do not reasonably import that if the crime includes one assault, the party accused may be found guilty of another assault, but must be read as if the word "laid," or "such," preceded the latter word "assault," in which case, thus far, at least, the meaning would be clear. If this construction, which seems to me to be the true literal interpretation of the passage, is erroneous, I see no other sensible construction than that which has been repudiated in argument, that, wherever a crime includes an assault, and the evidence proves an assault, however unconnected with the felony charged, and for whatever purpose offered in proof, the statute applies. If once it be conceded that it does not so necessarily apply, I see no middle course that is not founded on arbitrary conjecture, and dependent on circumstances rendering its application uncertain. The intermediate course of construction proposed I take to be, that wherever in an indictment for murder, assaults are charged in any of its counts as the means of committing the felony, and those assaults are adduced in proof by the prosecution as conducing to the death, and are proved by the evidence to have been in fact committed, although by that evidence they are entirely disconnected from the *corpus delicti* charged, the party accused may be convicted of such assaults, and this although the indictment contains a count correctly describing the means of the death which is not brought home to the prisoner. If this be so, consequences never contemplated may follow from the allowance of several counts in an indictment for murder. In case of murder, as in case of other felonies, each count on the face of it charges a separate felony; and yet it is obvious that unless a different person be supposed to be murdered, only one felony of death can be proved; and it is certain, that if the court were apprised before plea that two distinct murders were meant to be alleged, they would quash the indictment, or, if after

plea, they would compel the prosecutor at once to make his election on which charge he would proceed. But, if by the introduction of six counts into the indictment, stating the cause of the same death in six different ways, the prosecutor might obtain a verdict of guilty of assault on any count which charged it, though the assault was proved in fact to have had no connexion with the death, he would obtain the benefit of substantially charging as many felonies as counts, not in order to obtain a conviction of the principal charge, but of an assault altered in its penal consequences by arbitrary position on the record. Nay, if there should happen to be as many defendants as counts, and each count should charge (as it must) a different mode of death, and by different assaults, although the death should be proved to result from one act only, and that act committed by a single prisoner, or by a stranger; but each prisoner had committed such assaults as there alleged, each might be convicted of his own separate assault, and this although the prosecutor would not be permitted to prove more than a single felony as involving them. A single charge of murder may thus justify a conviction of numerous assaults on counts which may be introduced or used for the purpose of affixing to a single offence, or to such offences, aggravated penalties. But, again, the statute, when describing the offences to which it applies, uses the word singular, an "assault;" in stating the matter of which the accused may be convicted it uses the word "assault." Is it assumed that the party accused can be convicted of more than one assault? If he cannot, there is an end of the plea of previous acquittal, because the second indictment in this case charges two assaults; and surely, if the prisoners could only by law have been convicted of one on the former trial, they were only in peril in respect of one, and the plea is no answer, unless one can be found to be identical with two. If it is contended that they may be so convicted, what is the consequence? A count in an indictment may charge divers assaults at least between the first and last days of a year: these assaults may be charged in general terms, under which, proof of the most aggravated assault or assaults, not amounting to batteries, may be offered, and a party proved to have committed one of the slightest possible assaults, may be convicted, and subjected to infamous punishment, which else could not have been inflicted. If the circumstance that the indictment comprises a count which charges assaults to which proof corresponds, does not bring the case within the statute, surely the opening speech of the prosecutor's counsel, founded on instructions given by an individual client, though using the name of the Crown, perhaps, made from imperfect materials, cannot change the legal character of an act elicited in proof so as to affect the prisoner's liability to punishment. The evidence does not, more or less, "warrant the finding" because of the preface made to it, or the purpose for which it is used. The question is not whether the proof of assault was relevant to the issue, as it might be to prove malice, or whether it was offered in the expectation that it would

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be shown to be connected with, by conducing to the death; but whether, on the whole case developed in evidence, it was in very deed parcel of the act which is prosecuted as felony. This I take to be the doctrine acted upon by Mr. Justice Patteson in the case *Reg. v. Crumpton*, and acted upon at the first trial, and adopted by the learned judge, Mr. Russell Gurney, on the second trial. Of the authorities in argument, the most important are, *Reg. v. Phelps*, decided in 1841 (2 Moody Cro. Cas. Rep. 241), relied on for the prosecution; and *Reg. v. Birch*, decided in 1846, relied on for the prisoners, because these are the unanimous decisions of all the judges. In *Reg. v. Phelps*, the prisoner was indicted for the murder of John Overbury, who was slain in a scuffle. Phelps, with others, had assaulted the deceased on the evening of his death, but quitted the affray, which was afterwards renewed, and in which mortal blows were inflicted by persons unknown; there was no distinct evidence to show what led to the second assault on Overbury, or to connect it with the prior assault by Phelps. The jury acquitted Phelps of the murder, but found him guilty of an assault, and the point, whether he could be so legally convicted, was reserved. The judges were unanimously of opinion that the conviction was wrong, as they observed that "the assault must be such as forms one constituent part of the greater charge of felony, not a distinct and separate assault, as this was." It seems so difficult so distinguish that case from the case in judgment, that if this conviction be held wrong, it must, in my opinion, be by overruling that decision. Although, in the case of Phelps, the indictment is not set forth, it no doubt charged assaults by Phelps on the deceased by blows like the second count in this indictment: in that case there can be no doubt that the proof of such blows was offered and received in evidence to prove the felony; in that case, as in this, the evidence must have been given, not to prove the *animus* merely, but the very act of felony: in that case, as in this, the assault so charged was proved; and in that case, as in this, the jury might have found that the deceased died of the blows given by Phelps, though others afterwards struck him; but in that case, as in this, the assault was disconnected from the death, which arose in both cases from the act of persons unknown. In the present case, as soon as the medical evidence referred the death to a blow inflicted by some person unknown, shortly before the 4th of January, 1850, assaults committed in the preceding November were at least as much disconnected from the death as assaults committed by Phelps on the same day upon which the death occurred. *Reg. v. Birch* is an authority entitled to the greatest respect, as, being like the case of Phelps, the unanimous decision of the judges, and containing a development of the rule, which, in the opinion of those judges, should govern this class of cases; but I think that, rightly considered, neither the decisions as applied to the facts of that case nor its enunciation of principle, militates against the present conviction. The indictment charged a robbery with violence, the pri-

soner was seen with others on the night in question to strike the prosecutor several blows, but the proof of robbery failed; the jury found the prisoner guilty of assault under the statute, and the judges held the conviction right. Here the very transaction indicted, and which included an assault, was proved, but it was found not to amount to felony, one of the cases clearly contemplated by the statute. How does this show that a party can be convicted of an assault not associated with "the very act or transaction," that transaction being, in verity, the death charged, but produced by other means? The judges, on this occasion, considered the learned note in Mr. Greaves's edition of "Russell on Crimes," in which he seeks to confine the operation of the statute to cases of inchoate felony, which (with the highest respect for the learning of that excellent writer,) is wholly untenable, as it would exclude the cases to which the statute was primarily intended to apply when the act is complete, but the felonious intention wanting. They there lay down the rule "that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault; but in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also the part of the very act or transaction on which the Crown prosecutes as a felony by indictment." This rule disposes of the construction that the charging an assault in the indictment is sufficient to warrant the finding of guilty of assault where an assault is proved; and, taking the first clause in connexion with the last, it seems to me to refer the words, "the very act and transaction" of which it speaks, not to the matter charged in the indictment, but to the act itself, that is, in this case, the death, which is the sole subject of prosecution, and which depends not on the opening or motive of counsel, but on the entire proof in the case when developed before the jury. If this view of the case in judgment as applied to the statute is correct, the summing up of the learned judge presented the only question which could be raised properly to the jury. It is to be remembered that a plea of previous acquittal of felony pleaded to an indictment for assault is not like an ordinary plea of *autrefois acquit* of murder to another indictment of murder, and where the prisoner has nothing to prove but the identity of the prisoner and of the party whose death is charged as murder, to establish his plea. But, it being conceded that there are cases in which an indictment for felony includes an assault, and on the trial of which an assault is proved, and yet on which the prisoner cannot lawfully be convicted of an assault, and, therefore, is not in jeopardy of such conviction, it must on every such plea be matter of proof whether the prisoner could have been convicted of assault before; and that depends upon the question raised by the rule in *Birch's case*, whether the assault charged in the second indictment is part of "the very act or transaction" prosecuted on the first. This,

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s. 11—*Assault*
—*Autrefois*
acquitt.

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1851.

1 Vict. c. 85,
s. 11—*Assault*
—*Autrefois*
acquit.

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the assaults secondly charged on the prisoners were not, unless they were part of the felony, death, which was the subject of the former charge; and in putting the question whether they conducted in any way to the death, the learned judge put the question in the manner most favourable to the prisoners. It is true that when the evidence of the surgeon given on the first trial was read, and was repeated by them on the second, the "prisoners," as observed by the learned counsel, "had no chance of success," but this was because the facts afforded no ground out of which such chance could justly arise. On the whole, therefore, I think that the construction contended for by the prisoner's counsel, not being accordant with the object of the statute, nor justified by the language of the statute, nor founded on any intelligible principle, ought not to prevail. It would lead to the consequence of enabling a prosecutor or his counsel to deepen the responsibility of an offender, whose offence might be most trivial, by the form of the indictment and the course of evidence, so that a man indicted for murder against whom, in the course of the proceeding, an assault committed by him long before the death might be relevantly proved, might be acquitted of the murder on proof that it was committed by another, and, in addition to the calamity of being tried for the capital crime, of which he is guiltless, be liable by reason of that calamity to be visited with solitary imprisonment or hard labour. It is true that the discretion which, on such conviction, belongs to the court is not likely to be abused; and it is also true that it may sometimes be extremely convenient that such discretion should exist, as in the present case, where, on failure of the greater charge, an immediate punishment of proved criminality is expedient for the ends of justice. But, believing that the Legislature never intended to invest the court with such discretion in such a case, considering that the rule of law now to be defined or maintained may apply to cases entirely dissimilar in moral character to the present, and in which a discretion extended by mere accident may work most serious liabilities, which the law never contemplated, I adhere to the opinion which, on imperfect materials, I formed at the trial. Lamentable as it would be if the prisoners shall obtain impunity by the success of opposite positions, averting a conviction of assault on the first trial by successfully contending that it could not take place, on the very ground that the assaults proved did not conduce to the death charged, and succeeding afterwards by arguing that they might have been so convicted, they must, if they are now right, have the benefit of the error. But I think the prisoners' counsel were right in their contention on their first trial, and, if so, the present conviction is right.

WILLIAMS, J.—In this case the prisoners in substance allege in the plea, which they were put to prove by the replication, that they were legally acquitted on a former indictment of the assaults charged against them by the present indictment. And as it is plain that they could not have been legally acquitted of the assaults unless they were in peril of being legally convicted of them, the

question resolves itself into the inquiry whether, on the former trial, the prisoners could have been legally convicted of all the assaults charged by the present indictment, and I am of opinion that they could not. It cannot be doubted that this question depends altogether on the operation of the stat. 1 Vict. c. 85, s. 11. Before that statute, although the general rule was, that it was not necessary to prove the crime charged by an indictment to the whole extent laid, it being sufficient for the prosecutor to prove so much of the charge as constituted an offence punishable by law, yet this rule was undoubtedly subject to the qualification, that if a prisoner were indicted for a felony, he could not be convicted for a misdemeanor on that indictment. But by the statute in question, it is enacted, that "on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The language here employed appears to me to show that the statute did not intend that the person charged with a felony including an assault should be regarded in any event as charged with the offence of assault in addition to the crime of felony imputed by the indictment, but meant only that the portion of the crime of the imputed felony which consists of the offence of assault, shall, *per se*, be a subject of conviction and punishment, if it be proved that the prisoner is guilty of that portion, and of that portion only. If, therefore, it shall be proved that some person has been guilty of the whole of the imputed felony, including therein necessarily the imputed assault, but the evidence fails to implicate the prisoner in any portion of that guilt, he must, in my judgment, be wholly acquitted. The felony charged by the former indictment in the present case, was homicide by violence to the person of Mary Ann Parsons. The crime charged, therefore, included an assault. It was proved that her death had been caused exclusively by a blow on the head, inflicted shortly before her death, but there was no evidence to show that that blow had been struck by either of the prisoners. It was therefore proved that the assault, and every other portion of the imputed homicide, had been committed by some person unknown, but the prisoners were not implicated in any part of the guilt. It seems, therefore, to me that they could not be convicted of any part of it, but were entitled to a general acquittal. But it is said that this view of the case is at variance with the decision of all the judges in *Reg. v. Birch*. In that case the prisoner was indicted for feloniously assaulting one Charles Darley, putting him in bodily fear, and feloniously and violently stealing from his person a watch and other property. The prosecutor did not appear, and the proof as to the felony failed. But it was proved that on the night in question the prisoner struck the prosecutor several times about the head while he was lying on the ground. The jury found the prisoner guilty of an assault only,

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s. 11—*A assault*
—*Autrefois*
acquitt.

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1851.

1 Vict. c. 85,
s. 11—*Assault*
—*Autrefois*
acquid.

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not being satisfied that it was with intent to rob. And it was held by eleven judges, on a case reserved, that the conviction for the assault was right under the stat. 1 Vict. c. 85, s. 11. But it must be observed that in this case it was not proved that any one had been guilty of the imputed robbery. The Crown failed altogether either to prove an assault with intent to rob, or steal from the person of the prosecutor, and established only one portion of the crime of robbery: viz., that which consisted of the assault *simpliciter*, and of that portion the prisoner was guilty. It does not follow from this decision, that if it had been proved that some one unknown had been guilty of the felony charged and the assault included therein (but that the prisoner was not at all implicated in any part of this guilt) the judges would have held a conviction for assault to be warranted by the statute. In truth, they could hardly have so held without overruling the decision of *Reg. v. Phelps*, which they do not at all appear to have intended to do. In that case the prisoner was indicted with others for the murder of John Overbury. It was proved at the trial that in a scuffle the prisoner struck Overbury once or twice and knocked him down. The prisoner afterwards went home and took no further part in the affray, and shortly afterwards Overbury was again assaulted and killed by some other persons, who could not be identified; and there was no distinct evidence to connect the second assault with the prior assault by the prisoner. The jury acquitted him of the felony, but found him guilty of an assault. The judges, however, in a case reserved, thought that the conviction was wrong. But it has been argued that this view of the case is, at all events, at variance with the definition given by the judges, in *Reg. v. Birch*, of the requisites of an assault for which a conviction may take place under the statute, inasmuch as the judges, in effect, resolved in that case that it is only requisite that the assault shall be included in the charge on the face of the indictment, and also, "be a part of the very act or transaction which the Crown prosecutes as a felony by the indictment." And it is said that in the present case the "act or transaction" which the Crown prosecuted as a felony on the former indictment must, on the facts stated in the case reserved, be regarded as having consisted of the homicide of Mary Ann Parsons by means of the very assaults which are charged by the latter indictment. But why must the Crown be thus regarded as having "prosecuted these assaults?" The counsel for the Crown, it is true, stated them in his opening address as conducing to the death, adding, that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners. And the evidence afterwards given on behalf of the Crown undoubtedly included evidence of these assaults. But these circumstances fail altogether in my judgment, to establish that the assaults in question were "part of the very act or transaction which the Crown prosecuted as a felony." That "act or transaction" was, I conceive, the homicide of Mary Ann Parsons, including necessarily the violence

which caused her death, whatever it might be. And, in my opinion, as soon as it appeared by the evidence that a homicide had taken place, the assault which caused the death, and no other assault, became, necessarily, from the mere nature of the prosecution, identified as the assault which the Crown was prosecuting as part of, and included in that felony. If there had been any evidence that the prisoners were guilty of that assault, surely the case must have been left for the consideration of the jury exclusively of the other assaults. For if the jury were directed, first, to consider whether the prisoners were guilty of the assault which caused the death, and, consequently of the felony; and, secondly, in case they, the jury, acquitted of the felony, to consider whether the prisoners had been guilty of the assaults which did not conduce to the death, this would, in effect, be treating the prosecution as if it were an indictment for assault, and also for a felony including an assault; which, both by *Phelps's case* and the resolution in *Birch's case*, is demonstrated to be wrong. The same difficulty would occur if there had been evidence to implicate one only of the prisoners in the mortal assault. Could the jury in such a case have been properly directed to have considered the Crown as prosecuting the mortal assault as against one of the prisoners, and the assaults which did not conduce to the death as against the other prisoner? In the present instance, it is true, the case was stopped, and no case at all left to the jury; but this makes no difference, in my opinion; for whether a jury acquit in accordance with the view taken by the judge, because there is no evidence against the prisoner, or because the evidence is not satisfactory, in either case they, in truth, acquit for want of sufficient evidence to convict. It is manifestly fallacious to make the opening of counsel the test on the question of what is "the act or transaction which the Crown prosecutes?" It is plain that the court is not at all bound by the statements made by the counsel in his address. Suppose, in the present case, the counsel had stated that the last blow was the mortal one, and he should only give the preceding blows in evidence as proof of the *animus* of the prisoners, and it had turned out on the evidence that one of the preceding blows was the mortal one, and the last one had not at all conduced to the death, could the prisoners have claimed an acquittal of the felony, notwithstanding it was proved that they had inflicted the mortal blow? Again, suppose the counsel, in his opening, had omitted in his statement that the assaults now in question conduced to the death, and had merely mentioned them as proof of the *animus* of the prisoners, then by the application of this test (though the evidence would have been exactly the same), these assaults could not have formed a part of the "act and transaction which the Crown prosecuted," and the prisoners could not have been convicted of them. The test can hardly be a sound one which thus makes the liability of a prisoner to more severe punishment depend on the inadvertence or discretion of counsel, or the accident whether the evidence for the Crown is or is not prefaced

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by an address from an advocate. The material point of time is, I think, at the close of the evidence, when the judge has to perform the duty of telling the jury as to what part of the indictment there is a case for their consideration. At that point of time, at the trial of the former indictment in the present case, it had been proved by the evidence for the Crown, that the homicide imputed by the indictment, including an assault, had been committed. In my opinion, this demonstrated, *per se*, that the act or transaction which the Crown was prosecuting was the homicide which thus appeared to have been committed; consequently, I think the prisoners could not have been legally convicted under the statute of any assault which was not included in that transaction—in other words, which did not conduce to the death. I may add, that it seems to be impossible to come to a different conclusion without overruling *Reg. v. Phelps*; for overruling which case I have found no good reason. The question remains, whether the conviction on the present indictment was wrong by reason of the mode in which the case was left to the jury. I incline to think that the summing up was not strictly correct. For, notwithstanding that the assaults did not in any way conduce to the death of the deceased, the prisoners might have been in jeopardy of being convicted of them on the former indictment, but for the proof that some one, unknown, had committed the homicide charged against the prisoners, which demonstrated that these assaults were not any part of the transaction which the Crown was prosecuting. The question, therefore, which was submitted to the jury was not conclusive of the issue. It would have been so if the ruling in *Reg. v. Crumpton* (which the learned judge appears to have followed,) were law. But I consider that case to have been, in effect, overruled by *Birch's case*. Still, I am of opinion that the conviction was right. I think the learned judge correctly laid down that the burthen of proof lay on the prisoners, who were to establish the truth of their plea. Now, this could only be done by proving that they were in jeopardy, on the former indictment, of being convicted of all the assaults included in the latter. But the evidence adduced (as it is stated in the case reserved,) showed, according to the view I have taken of the operation of the statute, that they were not in such jeopardy. I think, therefore, that they failed in proof of their plea, and that they were properly convicted.

ERLE, J.—In this case the question turns upon the construction of the statute 1 Vict. c. 85, s. 11. The words of that statute indicate that the assault in the conviction should be the assault included in the supposed felony, and the cases decide that a conviction for an assault unless included in the felony in law as connected therewith in fact, would be wrong. Thus, upon a charge of felony in attempting to discharge a loaded pistol, an assault by blows not involved in or connected with the presentation of the pistol, was held not to be included by law in the charge: (*Reg. v. St. George*, 9 Car. & Marsh.) So where an indictment for a burglary with an intent to ravish contained a charge of an assault by blows, this

assault was held not to be included by law in such a charge of burglary: (*Reg. v. Watkins*, Car. & M. 264.) So, where upon a charge of rape it was proved that the prisoner assaulted at one time, and that another man committed the felony at another time, the assault by the prisoner at a different time was held not to be connected in fact with the crime charged: (*Reg. v. Gutteridge*, 9 Car. & Marsh.) So upon a charge of murder, an assault at a different time from that when the fatal blow was given was held not to be connected with the crime charged: (*Reg. v. Phelps and others*, 1 Russell, 781.) Also where, upon the same charge of murder, there was some evidence that the prisoners were co-operating in the beating that caused the death, it was left to the jury to say in effect whether the acts of the prisoners had conduced to the death. If yes, the prisoners were guilty of felony; if no, they were not guilty altogether; the evidence of the assault being equally evidence to prove the felony: (*Reg. v. Phelps, Southan and Smith*, 1 Car. & M. 180.) According to these decisions, the summing up of the learned judge now under consideration was correct, and his construction of the statute does not conflict with the principle which the judges laid down in the case of *Reg. v. Birch* (1 Denison, 185), with reference to the facts then before them, viz., that the assault intended by the statute must be included in the indictment, and must be part of the transaction which is prosecuted as a felony. In that case there was evidence of the prosecutor having been assaulted and robbed, and of the prisoner having taken part in the transaction when the assault and supposed robbery occurred; but the proof of the robbery was, in the opinion of the jury, imperfect. Under these circumstances, a conviction for an assault, which upon the evidence might have been a part of the felony charged, was supported. In the present case the cause of death being proved, and the assaults by the prisoner, which were in evidence, being also proved to be no part of the cause of death, and the cause of death being the transaction which is prosecuted as a felony, it seems to me that the assaults cannot be truly said to have been part of the transaction which is so prosecuted. The intention of the prosecutor to include them in the indictment is not alone sufficient to support a conviction, because that intention existed in the cases where the convictions were excluded. It is further to be observed, that there is a distinction between the charge of assault in cases of rape, robbery and felonious wounding, and that in cases of homicide by assault. In the first class, the charge relates to one transaction which is probably a felony, and the assault in question is a part of that transaction, and has its felonious character at the time of its committal. In the second class, upon a charge of homicide by assault, the essence of the crime is causing death: the felonious nature of the assault arises from the retrospective effect of death; and in many cases of homicide the felony is equally complete whether death was within the intention of the prisoner at the time of the assault or not. If the assaults and death stand in the

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acquitt.

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relation of cause and effect, the felony is proved; if they do not, the assaults are unconnected with the felony charged, and are no ground for a conviction under the statute. According to this reasoning the statute would not come into operation in cases of homicide by assault, and I believe it was not intended that it should. But if, after the decision, this reasoning is not adopted to the full extent, still the interests of public justice seem to me to require that the application of the statute should be restricted to those cases only of homicide where the subject of prosecution is one transaction, and where the death is attributed to a single occasion of assault, so as to be within the principle laid down in *Reg. v. Phelps*. It is important for public justice to conduct trials for murder with unity of attention, to free the judge from the technicality in which we are now involved, and the jury from referring the evidence to three alternatives—murder, assault and acquittal; but it is imperative to release a prisoner on such a trial from liability for various assaults. If he is liable to be convicted, of course he should have full notice and opportunity for defence; the death may be attributed in various counts to various assaults, sometimes single, sometimes in a series. If the prosecutor is found to be mistaken in supposing the assaults conducted to the death, and the prisoner is to be acquitted of felony, it is contended that he must then be acquitted of all the assaults which have been proved; but the Legislature cannot have intended that the mistake of the prosecutor should justify an unfair trial: and the trial would not appear to me to be fair, if the prisoner, when defending himself for murder, is also called on for a contingent defence against charges for several alleged assaults in the course of several weeks, some of which may be open to contradiction, others to justification, and others to mitigation. The purpose of the statute was to prevent the delay and trouble of a second indictment for assault. In cases of homicide by several assaults, that saving would be effected by a sacrifice of justice, and that construction of the statute is to be adopted which most avoids this inconvenience. The learned judge adopted the construction of the statute which gives it this restricted application, and his summing up is objected to on that account. But, upon the grounds above stated, the objection, in my judgment, fails, and the summing up ought to be sustained.

CRESWELL, J.—The question now to be determined arises out of the enactment in 1 Vict. c. 85, s. 11, "That, on the trial of any person for any felony whatever, wherever the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The crime charged means the *felony* charged, and that must be of such a nature that it cannot be committed without an assault. If the crime charged does not necessarily include an assault, I conceive that the case cannot be brought within the section by an express averment, that an assault was committed. If the question were a new one, and I had been called upon to

construe the enactment without reference to decided cases, I should probably have been of opinion that it was intended to apply to those cases only where an attempt had been made to commit a felony, which had not been perfected; and, in making the attempt, an assault had been committed. But it has been held that the statute ought not to have so limited a construction, and that a party indicted for robbery may be acquitted of that felony and found guilty of assault, although the jury negative any intention or attempt to rob. On the other hand, it has been held that the enactment ought not to have the widest application of which the words used are capable, but that the assault, to come within it, must be included in the charge on the face of the indictment, and also be part of the "very act or transaction which the Crown prosecutes as a felony" by the indictment. Those two points were ruled by the unanimous opinion of the judges in *Reg. v. Birch and another* (1 Den. 185.) That case having been so decided, it is, in my judgment, much better to abide by it, whatever doubts I may entertain as to the construction of the statute, than to render the criminal law uncertain, by re-opening a question which has been decided by the whole body of judges. If the decision of the whole body pronounced one year may be overturned the next, that reversal may again be overturned the following year; and such a course of proceeding would bring the whole criminal law into a state greatly to be deplored. I therefore abide by the decision in *Reg. v. Birch and another*, and hold that the assault of which a party may be convicted, under the 1 Vict. c. 85, s. 11, must be part of the "very act or transaction which the Crown prosecutes as a felony," but that it need not be committed in attempting to commit the felony charged. The matter to be determined in the present case then is, whether the assaults for which the Birds were indicted and tried before the learned judge, who has reserved this case for consideration, were part of that act or transaction which the Crown prosecuted as a felony before my brother Talfourd on a former occasion. If they were part of that transaction, the prisoners might have been convicted, and they cannot be tried a second time for the same offence; otherwise the present conviction is right. On this part of the case also, I have a decision of the whole body of judges to guide me, for I cannot distinguish the case of *Reg. v. Phelps* (2 Moo. Cro. C.; reported also in 1 Russ. by Mr. Greaves) from the present. In that case Phelps was indicted, together with two others, Southan and Smith, for the murder of Overbury by blows. Evidence was given that Phelps had struck the deceased more than once and knocked him down; but other evidence was also given, which showed that those strokes were not the cause of death, and that Phelps had gone away a quarter of an hour or more before the blow was given to which the death of the deceased was ascribed. The late Mr. Justice Coltman told the jury that there was no evidence to support the charge of murder against Phelps, but that they might find him guilty of assault, which they accordingly did. The case was left to the jury on the charge of

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acquitt.

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relation of cause and effect, the felony is proved; if they do not, the assaults are unconnected with the felony charged, and are no ground for a conviction under the statute. According to this reasoning the statute would not come into operation in cases of homicide by assault, and I believe it was not intended that it should. But if, after the decision, this reasoning is not adopted to the full extent, still the interests of public justice seem to me to require that the application of the statute should be restricted to those cases only of homicide where the subject of prosecution is one transaction, and where the death is attributed to a single occasion of assault, so as to be within the principle laid down in *Reg. v. Phelps*. It is important for public justice to conduct trials for murder with unity of attention, to free the judge from the technicality in which we are now involved, and the jury from referring the evidence to three alternatives—murder, assault and acquittal; but it is imperative to release a prisoner on such a trial from liability for various assaults. If he is liable to be convicted, of course he should have full notice and opportunity for defence; the death may be attributed in various counts to various assaults, sometimes single, sometimes in a series. If the prosecutor is found to be mistaken in supposing the assaults conducted to the death, and the prisoner is to be acquitted of felony, it is contended that he must then be acquitted of all the assaults which have been proved; but the Legislature cannot have intended that the mistake of the prosecutor should justify an unfair trial: and the trial would not appear to me to be fair, if the prisoner, when defending himself for murder, is also called on for a contingent defence against charges for several alleged assaults in the course of several weeks, some of which may be open to contradiction, others to justification, and others to mitigation. The purpose of the statute was to prevent the delay and trouble of a second indictment for assault. In cases of homicide by several assaults, that saving would be effected by a sacrifice of justice, and that construction of the statute is to be adopted which most avoids this inconvenience. The learned judge adopted the construction of the statute which gives it this restricted application, and his summing up is objected to on that account. But, upon the grounds above stated, the objection, in my judgment, fails, and the summing up ought to be sustained.

CRESSWELL, J.—The question now to be determined arises out of the enactment in 1 Vict. c. 85, s. 11, "That, on the trial of any person for any felony whatever, wherever the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The crime charged means the *felony* charged, and that must be of such a nature that it cannot be committed without an assault. If the crime charged does not necessarily include an assault, I conceive that the case cannot be brought within the section by an express averment, that an assault was committed. If the question were a new one, and I had been called upon to

construe the enactment without reference to decided cases, I should probably have been of opinion that it was intended to apply to those cases only where an attempt had been made to commit a felony, which had not been perfected; and, in making the attempt, an assault had been committed. But it has been held that the statute ought not to have so limited a construction, and that a party indicted for robbery may be acquitted of that felony and found guilty of assault, although the jury negative any intention or attempt to rob. On the other hand, it has been held that the enactment ought not to have the widest application of which the words used are capable, but that the assault, to come within it, must be included in the charge on the face of the indictment, and also be part of the "very act or transaction which the Crown prosecutes as a felony" by the indictment. Those two points were ruled by the unanimous opinion of the judges in *Reg. v. Birch and another* (1 Den. 185.) That case having been so decided, it is, in my judgment, much better to abide by it, whatever doubts I may entertain as to the construction of the statute, than to render the criminal law uncertain, by re-opening a question which has been decided by the whole body of judges. If the decision of the whole body pronounced one year may be overturned the next, that reversal may again be overturned the following year; and such a course of proceeding would bring the whole criminal law into a state greatly to be deplored. I therefore abide by the decision in *Reg. v. Birch and another*, and hold that the assault of which a party may be convicted, under the 1 Vict. c. 85, s. 11, must be part of the "very act or transaction which the Crown prosecutes as a felony," but that it need not be committed in attempting to commit the felony charged. The matter to be determined in the present case then is, whether the assaults for which the Birds were indicted and tried before the learned judge, who has reserved this case for consideration, were part of that act or transaction which the Crown prosecuted as a felony before my brother Talfourd on a former occasion. If they were part of that transaction, the prisoners might have been convicted, and they cannot be tried a second time for the same offence; otherwise the present conviction is right. On this part of the case also, I have a decision of the whole body of judges to guide me, for I cannot distinguish the case of *Reg. v. Phelps* (2 Moo. Cro. C.; reported also in 1 Russ. by Mr. Greaves) from the present. In that case Phelps was indicted, together with two others, Southan and Smith, for the murder of Overbury by blows. Evidence was given that Phelps had struck the deceased more than once and knocked him down; but other evidence was also given, which showed that those strokes were not the cause of death, and that Phelps had gone away a quarter of an hour or more before the blow was given to which the death of the deceased was ascribed. The late Mr. Justice Coltman told the jury that there was no evidence to support the charge of murder against Phelps, but that they might find him guilty of assault, which they accordingly did. The case was left to the jury on the charge of

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murder as to the other two prisoners, and they were altogether acquitted. The propriety of the conviction of Phelps was reserved for the opinions of the judges, who held that, as the assault proved did not form a constituent part of the greater charge of felony, but was a distinct and separate assault, the conviction was wrong. They therefore decided that the assault so committed by Phelps was not part of the "act or transaction" which the Crown prosecuted as a felony by that indictment. Here, the Birds were shown to have committed various assaults, but the evidence negatived their being the cause of the death of Mary Ann Parsons, which was ascribed to a blow inflicted at a subsequent time, and the party who inflicted it could not be ascertained, whereupon the judge told the jury, and in my opinion rightly, that there was no evidence to establish the charge of murder against the prisoners, and the evidence then given showed that the assaults proved to have been committed by the Birds were not part of the act or transaction prosecuted in that case. Feeling, therefore, that the case of *Reg. v. Phelps* cannot be distinguishable from the present, and that it was decided by the whole body of judges for the reason given above, I should think it right to act upon it as a binding authority, even if I doubted the propriety of the decision: but it seems to me to be correct. The "act or transaction" which the Crown prosecuted by the indictment for murder preferred against the Birds, was the act of killing Mary Ann Parsons, "of malice aforethought, by blows." The indictment did not describe the particular blows by which the death was occasioned, and it was competent to the Crown to give evidence of any blows given by the prisoner, and to endeavour to show that they were the cause of death. But still the "transaction" prosecuted was the death, and the means by which it was occasioned, and when the evidence showed that the death was occasioned by a particular blow, and that the others before proved were not part of the same transaction, but wholly distinct and independent of it, the judge who tried the prisoners was bound to withdraw them from the consideration of the jury on the charge of murder, and, as in *Phelps's case*, a conviction of those assaults would have been wrong. Nor can I discover that this view of the subject is inconsistent with *Reg. v. Birch* and other cases, where it has been held that although the evidence fails to show that the supposed felony prosecuted by the indictment has been committed at all, nevertheless the party charged may be convicted of an assault, for it may be ascertained by evidence what is the transaction really prosecuted, *exemptor gratia* indictments for rape, evidence, assault, indecent liberties, an apparent attempt to commit the crime charged but no completion of it. The transaction is ascertained, and an assault being part of it, comes within 1 Vict. c. 85, s. 11. So in the case of an indictment for robbery, as in *Reg. v. Birch*, if there were evidence of one assault and nothing more, that would appear to be the transaction prosecuted. But assume the evidence to be of an assault, and afterwards another and independent assault, and on this latter occasion money lost,

the latter would appear to be the real transaction prosecuted, and the party, if acquitted of the latter transaction, could not be found guilty of the first and independent assault. I think, therefore, that, upon principle and authority, I am bound to say that the present conviction is right.

WIGHTMAN, J.—The question in this case, in substance is, whether the prisoners upon their trial before my brother Talfourd, on an indictment which charged them with murder, could have been found guilty under the 11th section of 1 Vict. c. 85, of an assault charged against them by the indictment subsequently preferred against them, and to which they have pleaded *autrefois acquit*. The words of the statute are: "Be it enacted, that on the trial of any prisoner for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." It is perfectly clear that this clause was not intended to apply to any assault in fact proved against the prisoner upon a trial for felony, including assaults, though totally unconnected in time, place, or circumstance, with the felony charged; and from the time of the passing of the statute, its application has come into question in a great many cases, and there are *dicta* and decisions of individual judges which is not easy, and which, indeed, it may be impossible, wholly to reconcile. But I do not think it necessary or expedient to refer to more than four cases, two of which have come under the consideration of all the judges, and two others of which, though only expressing the opinion of individual judges, agree so exactly, it appears to me, in principle, as to the instances in which the statute may be applied, with the two cases that have come before all the judges, that I cite them as additional authorities for the construction to which I have arrived in the present case. The cases to which I refer are *Reg. v. Phelps*, and *Reg. v. Birch*, before all the judges; and *Reg. v. St. George*, before my brother Parke; and *Reg. v. Crumpton*, before my brother Patteson. These cases, differing in some respects and circumstances, all agree in the principle upon which the statute is to be applied, that prisoners could only be found guilty under the act of Parliament of the immediate act which was involved in and formed part of the act or transaction which was charged as a felony in the indictment. This, indeed, was stated in terms by my brother Parke, in the case of *Reg. v. St. George*, in which he referred to the former case of *Reg. v. Gutteridge*, to the same effect, and to the opinion of my brother Patteson in *Reg. v. Crumpton*, and is the opinion of all the judges expressed in *Reg. v. Birch*, and *Reg. v. Phelps*. Assuming then, that the principle upon which the question whether prisoners charged with felony, including an assault, can be acquitted of the felony and be convicted of the assault, is settled by the cases to which I have referred, it only remains to apply that principle to the present case. The

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prisoners are charged upon this indictment, with the murder of Mary Ann Parsons, by beating and striking at different times, as stated in the indictment. The act or transaction charged against them as a felony was the assaulting and beating, which caused the death of Mary Ann Parsons. The death was proved by the prosecutor to have been wholly caused by a blow given very shortly before, or on the 4th of January, 1850, but as there was no evidence that that blow was inflicted by either of the prisoners, they were acquitted of the felony with which they were charged: but it was proved in the course of the trial that on several days and occasions before the day when the fatal blow was given, the prisoners had assaulted and beaten the deceased; but those assaults were quite distinct and independent of the act or transaction which caused the death, which was the felony charged. It is true that the felony is charged to have been committed by beating, and that the deceased did die by beating, and that the prisoners were proved to have beaten her, but the assaults and beatings proved against them did not form part of the act or transaction which was charged as a felony in the indictment (which was the assault or beating which actually caused the death) as appeared by the evidence in support of the charge of felony against the prisoners. The Crown prosecuted in respect of the assaults and blows which caused the death, and they proved that, at the particular time, a blow was inflicted by some one which did cause the death of the deceased, it was that blow, and that blow only which caused the death, and was in fact, as appeared by the evidence before the court, the act which was charged as felonious. The prisoners were not proved to have committed that act; nor were any of the assaults or beatings proved against them, nor were they a part of the transaction which the Crown proved to be the cause of the death. They were therefore not involved in, nor did they form part of the act or transaction which was charged as felony in the indictment. In the case of *Reg. v. Birch and others*, the prisoners were indicted for feloniously assaulting and robbing the prosecutor with violence. The evidence proved that the prosecutor was attacked by several persons, and knocked down, and that the prisoner was seen to strike him while upon the ground, with other persons about him, also misusing him: but, by reason of the absence of the prosecutor the charge of felony was not supported, but the prisoner was convicted of assault under the statute, and they held rightly, because the assault formed part of, and was involved in, the act or transaction which was charged as a felony in the indictment. It was clear that it was then, at that time, that the felony charged in the indictment was committed, if committed at all, and the assault formed part of that transaction, and was involved in it. The distinction between that and the present case appears to me most clear. If in the present case it had appeared that at the time the mortal injury was received, the prisoners were with the deceased, and had assaulted and beaten her immediately before the death, if that evidence raised a doubt whether the mortal injury was occasioned by the blows then

inflicted by the prisoners, or by a fall which might be attributed to accident, and on that ground the jury had acquitted the prisoners of the felony, I should think that they might have been convicted of assault under the statute; for in that case the assault proved would have been involved in, and formed part of, the act or transaction charged as a felony in the indictment, and prosecuted as connected with it. Though the evidence failed to establish it as a felony, it was the only transaction which was intended to be charged as such. If that was not felonious, in that case there would be no other, for the assaults in question were wholly unconnected with the intent of the transaction, which was proved on the part of the prosecution to have caused the death of the deceased, and which was the felony charged against the prisoners, and of which they might have been found guilty if they could have been proved to have been acting in it. I may observe that the issue taken by the replication to the plea of *autrefois acquit* is, that the prisoners were not upon the former trial acquitted of the felony of murder, including the same identical assaults charged in the second indictment. For the reasons I have given, it appears to me that the felony of murder charged in the first indictment did not include the same identical assaults charged in the second indictment. The learned commissioner, in charging the jury, told them that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown. This, perhaps, is hardly correct in part, as the question is not whether the assault actually conducted to the death of the deceased, but whether it was part of the very act or transaction which was charged as felony in the indictment. But this is not a case for a new trial; and the question substantially is whether, notwithstanding the defect, if it be one, the verdict is, under all the circumstances, right. The charge of the learned commissioner, directing the jury to the main point, whether the assaults were distinct and independent assaults, clearly meaning distinct and independent of that which was involved in, and formed part of, the act or transaction charged as felony by the prosecution, seems to me to be perfectly correct to that extent, and it would be too much to set aside a verdict fully warranted by evidence, because, upon a critical examination of the judge's charge, there may have been a partial defect, the charge in substance being correct. Upon the whole, therefore, I am of opinion that the prisoners could not, consistently with the principle which I have already stated, have been convicted upon the first indictment of those assaults which were the subject of the second, and that the verdict which has been found for the Crown is right.

COLERIDGE, J.—I have considered this case with all the attention which the known conflict of opinions upon it among the judges made it proper for me to bestow, and although I cannot say that I have arrived at a conclusion free from all doubt, yet upon the whole I think that the conviction was right. The question depends

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on the true construction to be put upon the words of the statute that at "the trial of any person for any felony whatsoever, whenever the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." These words are very general, and yet as justice requires; so I think from the very words, if closely examined, some limitations will be found clearly implied upon their generality, and these it will be right to point out. First, I remark the change of language from "felony" to "crime charged;" the first points to the species, the second to the individual case, and that case must be "charged," that is, expanded in statement on the indictment. The statute, therefore, applies only where the individual crime, being a felony in itself involving an assault, shall, as it is charged on the face of the indictment, include an assault on the person, and the whole charge will be compounded of the assault, and all those circumstances, whether of act, intent, or consequences, which go to make the felony complete; these, with the former, altogether making one whole. The statute then proceeds to say, that in such case the jury may "acquit of the felony" and find a verdict of "guilty of assault." Whether this means that they may first acquit of the whole charge as preferred, and then looking at the facts composing it, select one and find the prisoner guilty of the assault as a new charge, or only that they may acquit of the felonious part of the charge and convict of the assault which formed the other part, is immaterial, for in either way the assault of which they find guilty must clearly have been that which was involved in and made part of the one entire crime charged on the face of the indictment. No one reading the section, and at all accustomed to the rules of legal interpretation, would suppose that any independent assault, though receivable in evidence it may be, as conducting to the proof of the prisoner's guilt, could be made the subject of the verdict; that would be to convict the prisoner of an offence with which he had never been charged, against which he had never, in fact, defended himself, and which he could not be supposed to be prepared to do. Thus far seems clear. But a further question is raised upon the words "acquit of the felony." An acquittal may take place where one prisoner only is charged, either because the proof fails to show that any felonious act has been committed, or because the act, appearing to be felonious, is not brought home to the prisoner, and where more than one prisoner is charged. Also, because he is not proved to have taken part in the act which, as to all or some of those charged with him, is found to be felonious. The statute does not, in terms, regard these distinctions, nor do I think it material to follow them out, because, if they at all affect the application of the statute—that is, if the statute does not apply to all cases of acquittal, but only to some, it will be found, I am convinced, if the inquiry be followed out, to depend on this—whether on the given ground of acquittal the assault could or could not be part of

the whole crime charged as felonious. It seems to me, too, I own, that to make this directly the test of the applicability of the statute, leads to a more technical, or if it be thought a fitter expression, a more strictly scientific rule of construction than is proper for the occasion; for I conceive it clear that the statute was framed to meet a commonly occurring evil of the entire escape from punishment of one who was clearly guilty of a part of the charge because he was not found guilty of the whole; and that in framing their remedy for this the framers were not careful to observe the precise conditions of the existing criminal law. Indeed, the remedy is founded on an avowed innovation upon it. Whether this might have been avoided, or had better have been avoided, is not the question. Our duty is to interpret the statute as we find it, and bearing this in mind in order the better to fulfil its intents. But recurring to that which I consider the true and the more expedient test, whether in any given case a party acquitted of felony may be found guilty of assault, the test, namely, whether the assault of which it is proposed to find him guilty formed part of the whole crime charged is felonious, the question still arises—How are you practically to ascertain that? And here I think it most convenient to introduce the case of *Reg. v. Edward Birch and Hardy*, because the resolution in that case brings us down to that point in the inquiry at which I have now arrived. “The judges there are reported,” according to the manuscript note of my brother Parke, “to have thought that the enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were of opinion that, in order to convict of an assault under the section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment.” The rule here laid down is the same to which a mere consideration of the statute, unaided by any decisions, would have brought me. But then arises the question, how in any given case it is to be ascertained whether the assault on which the verdict is to be allowed to pass was “included in the charge and in the face of the indictment,” and also “whether it be part of the very act or transaction which the Crown prosecutes as a felony by the indictment.” The generality of the language of our indictments makes it impossible to determine the first question merely by looking to the face of the instrument. We can learn no more from that than whether any assault is charged or not—what assault, when, where, and how committed, all particulars, in short, from which identification of charge and proof as to specific assaults could be made out, are left entirely unascertained by that. A state of things at first sight difficult to reconcile with the theory of pleadings, however little inconvenience it may be found to work in practice. Again, it would not be right to let the determination of the second question depend upon the opening

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speech of the counsel for the Crown, nor on the course he may pursue in conducting his case: often there is no opening speech; often there are no counsel for the Crown. But assuming there were both in all cases, it could not be left to the counsel merely by stating the assault in the opening, or offering evidence of it in the course of his proof to make the prisoner liable to a verdict for it, unless the circumstances were such as really brought it within the scope of the statute. It seems to me, however, I own, that there is more seeming than real difficulty in a practical application of the rule as it is laid down in *Birch's case*. In the first place, the indictment must be supposed to have alleged an assault or assaults (it is immaterial which), and one or more must be supposed to have been given in evidence. It must be supposed, too, that when the evidence is closed, the judge by the light that it affords, will have been enabled to see what "act or transaction" it is which it has been intended to "prosecute as a felony by the indictment" (for that which he has, in fact, attempted to substantiate, the counsel must be taken to have intended to prosecute), and with that knowledge how shall the judge have any difficulty in seeing whether there is any evidence to connect the assault or assaults proved with the felonious act or transaction which it has been sought to prove? It is the province of the judge on all trials to determine whether there is any evidence to prove an issue, and the connexion I now speak of is in the nature of an issue. If there be evidence, the question for the jury will be, do they believe it, and also the fact of the assault?—and if they believe both, the prisoner will be found guilty under the statute. Of course, what the nature and extent of the connexion must be to satisfy the statute; what the evidence as regards time, place, intent, or other circumstance to make it out, the judge would have to point out to the jury. If there be in the judge's opinion no such evidence, this matter could never go to the jury. Every case of this kind supposes an acquittal of the prisoner of the felony charged, but it has been thought that distinctions may arise according to the ground of acquittal. Now, this may be either because the jury think no felonious act has been committed at all, as that, in case of murder, the deceased has died from natural causes; or in robbery, that no money or chattel has been taken from the prosecutor, or because they think the felonious act is shown to have been committed by some third party, with whom the prisoner is not so connected as to be a felonious accomplice; or because simply they think the act, or the felonious intention, not satisfactorily brought home to the prisoner. But in all these cases equally the prisoner is disconnected with the felonious charges. The acquittal in all is simply that he is not guilty. A felony supposed to be committed by another, or not proved as to him, is as to him and as to the charge in hand as much as no felony—as if none had ever existed at all. And, therefore, in all these cases the supposed assault is equally disconnected with the felony; it can form no part of that which by the assumption does not exist at all.

But it is obvious that this cannot prevent that sort of connexion which the statute requires, because if it did, the statute, which applies only in cases of acquittal, could have no operation at all. The ground of acquittal may, indeed, often in individual cases show that the statute cannot be resorted to; but it will not, I conceive, ever make the application of the rule, according to the course I have sketched out, impracticable. I have forborne in these remarks from citing cases, with the exception of that of *Reg. v. Birch*, on which I have dwelt, for the obvious reason that it was one decided by the assembled judges, in which it was attempted to lay down a rule for future guidance. I have considered myself bound by that case, and my only object has been to understand and apply it. Decisions of single judges, with all the sincere respect I feel for those who have pronounced them, I think are not entitled to much consideration, whereas in the present case we are trying the rule laid down by the body, and seeking to illustrate and apply it. There is, I think, but one other case decided by the judges upon the section, and this so remarkably like the present, that I am unable to find any substantial difference between the two. I mean the case of *Reg. v. Phelps*. Like this, that was a charge of murder against more than one person, all charged as principals in one count, and the death alleged to have been occasioned by striking and beating. All were acquitted of the felony: there was evidence against two that they were present at, and took part in the violence, which occasioned the death; but Phelps, who had struck the deceased several blows, had gone away, from fifteen to thirty minutes before the violence was committed. The learned judge who tried the case seems, from the report in *Car. & M.*, rather to have assumed, that if this evidence against Phelps were believed, he might be found guilty of assault; and he was so convicted. But the judges were unanimously of opinion that the conviction was wrong. They assumed, in fact, that it was a distinct and separate assault; and they laid down in substance the same rule as that afterwards propounded in *Birch's case*, viz., that to bring a case within the statute, "the assault must be such as forms one constituent part of the greater charge of felony." Neither report is full enough to enable one to say whether there was any evidence to connect Phelps's assault with the fatal and felonious violence of other persons, such as to make it part thereof without making him guilty of the felony; if there were, the result only would have been different, but the rule the same. Even if I thought this case wrongly decided, I should not feel that we were at liberty, divided as we are in opinion, to overrule it. Uniformity of decision, if it be important in any court or in any branch of the law, is above all, important in this Central Court of Criminal Appeal, and in this branch of our law. But it is a great satisfaction to me, after much doubt and fluctuation of opinion, that I can concur with it entirely, and have the benefit of its authority. My judgment is already so much longer than I could have wished, that I will not prolong it either by applying what I have said at

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any length to the case before us, or by any consideration of the objection made to the direction of Mr. Gurney. In my view the latter cannot be necessary, for it resolves itself ultimately into the main point; and in any view the former may be dispensed with, after the judgments already pronounced, and where we are all so familiar with the facts and the questions we have had to consider. I will only say that the assaults given in evidence on the first trial, respecting which the present question has arisen, appear to me to have been so entirely and unquestionably severed from the felonious act or transaction of which the prisoners were acquitted, that my brother Talfourd was perfectly justified in not submitting them to the jury. I am, therefore, of opinion that the present conviction was right.

PATTESON, J.—Two questions appear to me to arise in this case, first, whether the prisoner could have been convicted upon the former trial of all the assaults charged in the present indictment, and secondly, even supposing they could not, whether the proper points were put to the jury by the learned judge upon the present trial. The former indictment contained several counts, in some a single assault and murder was charged, in others a series of assaults on different days, causing together the death of the deceased and constituting the crime of murder. It is plain that one felony only is charged from the nature of the crime—murder of one individual; it is impossible that the counts could be treated as charging separate felonies, and the judge could not be called upon to put the prosecutor to his election. By the evidence, it appeared that the death arose exclusively from one assault and wound shortly before the death, and that all the other assaults were unconnected with the death. But the infliction of that assault and wound was not brought home to either of the prisoners, consequently they were entitled to be acquitted of the murder and of the assault which really caused the death. But several assaults were proved against them prior to that which caused the death, though unconnected with it; and whether they might have been convicted of those assaults, is the question. The statute, 1 Vict. c. 85, s. 11, provides that "On the trial of any, for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." I do not think that this clause is to be confined to such crimes as necessarily include an assault, as rape, robbery, wounding with intent to murder, and such like. If it were so confined, murder and manslaughter would not be within it, for they may be committed without an assault, as by poisoning or negligence. I am satisfied that the clause extends to such crimes which in their nature may or may not include an assault, but which are charged in the indictment as so doing. The words of the clause are very general, and might at first sight be supposed to warrant a conviction for assault where the proof of the felony failed, whether that

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assault were connected with the supposed felony or not, and at whatever time, however distinct from the time of the supposed felony it took place. But the manifest injustice of so construing them, has made it necessary to put some limitation upon their meaning. Accordingly, many cases have occurred in which learned judges have felt themselves bound to lay down what they considered to be the true limitation. Those cases were cited and commented upon when the present case was argued; and I do not propose to enter into a detailed examination of them. They are for the most part decisions of single judges on the circuit, entitled certainly to have full weight given to them, and assisting us greatly in coming to a right conclusion upon the present case, in which they are in some measure brought under review. They are, for the most part, cases in which the felony charged, has included a single assault, and they lay down the rule that in such cases there can be no conviction for an independent assault at a different time, because such assault can by no reasonable construction be treated as the assault included in the felony charged. There are, however, two cases reported which have been brought under the consideration of the whole body of judges, and from them I apprehend the rule may be, and ought to be taken: I allude to the cases of *Reg. v. Phelps and others* (2 Moo. Cro. Ca. 240), and *Reg. v. Birch* (1 Den. 185.) In the case of *Reg. v. Phelps and others* (reported also in 1 Carrington & Marshman, 180), Phelps and two others were indicted for murder. It turned out in evidence, that Phelps after having assaulted and knocked down the deceased, ran away; the deceased was afterwards assaulted and killed by some other persons supposed to be the other prisoners: the two assaults were not connected together. The learned judge left to the jury the question whether the other two prisoners were guilty of manslaughter—it was a case where the offence was reduced to manslaughter under the circumstances—and told them that they must acquit Phelps of the felony, but might find him guilty of assault. They found the other two prisoners not guilty, and Phelps guilty of assault. But upon reference to all the judges, it was held unanimously that Phelps could not, under the circumstances, be convicted of assault. In that case, as in the present, there was an assault which caused the death, but it was not proved against any of the prisoners; there was, as in the present case, an unconnected prior assault proved against one prisoner. But it was held by the judges not to be the assault included in the felony charged by the indictment. Yet in that case, as in the present, the assault committed by Phelps was supposed by the framer of the indictment, to be connected with the death, and was proved by the Crown, and attempted to be connected with it; and it was shown by the evidence, which was believed by the jury, that it was disconnected with the death. The whole matter remained in doubt till the jury found their verdict, by which they acquitted all the prisoners of felony, not because they did not believe that a felony had been committed by some one, but because it was not proved against any

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one of the prisoners. If they had believed the assault committed by Phelps to have conduced to the death, they must have found him guilty of manslaughter. The indictment alone, therefore, does not afford the test as to whether any assault that is proved, is included in the felony charged; but that question depends on the indictment coupled with the evidence and the finding of the jury. I confess I am unable to distinguish the case of *Reg. v. Phelps and others* from the present case. But it is said that the authority of that case has been shaken by the subsequent case of *Reg. v. Birch and others*, which is reported in 1 Den. 185, and mistakenly said to have been tried before me, whereas it was tried before Mr. Armstrong. So far from this case shaking the authority of the former one, in my judgment, it entirely confirms it. That was a charge of robbery. The prosecutor did not appear, and there was no proof of the robbery; but a witness who saw the transaction proved an assault, and the jury not having any evidence of intent to rob, found the prisoner guilty of a common assault. There was but one transaction proved, and there could be no doubt that it was the same transaction which was to be proved, and for which the prisoner was indicted as a felony. Mr. Armstrong stated a case for the opinion of the judges, and they held the conviction for assault right. In the report are these words:—"The judges thought upon consulting all the authorities, that the enactment in the statute was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were of opinion that in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction, which the Crown prosecutes as a felony by the indictment." This seems to me to be in exact accordance with *Reg. v. Phelps and others*. No difficulty can ever occur, as it appears to me, where the felony charged cannot from its nature, or does not in the manner in which it is charged, include more than one assault. One single transaction will be inquired into, and if the prisoner be proved to have been involved in that transaction, the quality of his act, whether felony or assault only, will be the main question. If the evidence satisfies the jury that the assault alleged was felonious, but fails in fixing the prisoner as the person committing it, he must be acquitted altogether, and cannot be found guilty of an independent assault committed at another time. I cannot collect from the language used in the statute, nor can I conceive that the Legislature intended, that where the evidence establishes the commission of a felony, including an assault by somebody, the jury can never be at liberty to convict of an assault only. In such case, either the prisoner must be guilty of the whole charge, or, if he be not proved to be the guilty person, he must be acquitted of the whole. Any other assaults proved against the prisoner cannot be taken to be "part

of the very act or transaction which the Crown prosecutes as a felony," merely because in drawing the indictment they have been so charged wrongly and contrary to the real state of the facts. There being a felony proved by the evidence, if the assaults proved against the prisoner be connected with that felony, and conduce to it, the prisoner is guilty of felony; if they be not so connected, they are no part of "the very act or transaction which the Crown prosecutes as a felony." If, indeed, the very act or transaction which the Crown prosecutes as a felony, turns out by the evidence not to be felonious, and so no felony at all is proved, then, if the assault be proved against the prisoner, he may be acquitted of felony, and convicted of assault. And this may be the case even in murder or manslaughter; for it may happen that the prisoner has severely assaulted the deceased, and the death may have been supposed to have been the result of such assault, and the prisoner may have been indicted for murder or manslaughter under such a supposition. Yet it may turn out in evidence that the deceased died from natural causes, not occasioned nor even aggravated, or in any way affected by the assault proved; and in such case the prisoner might, I think, be convicted of assault: and I doubt whether *Reg. v. Crumpton* (1 Car. & M. 597,) was rightly decided, there being in that case, in truth, only one assault proved. So that the view I take of the statute would not make it impossible even to convict of assault on an indictment for murder or manslaughter, though it would be very unlikely that such a case should occur. I do not, however, mean to say that even if such a consequence did necessarily follow it would alter my view of the statute. I found my opinion upon what I believe to be the true meaning of the statute; and, upon the authority of the two cases to which I have particularly referred, I think that the question whether the jury can find a verdict of guilty of assault depends not merely on the indictment, or on the course adopted by the prosecutor at the trial, or on what he may have attempted to prove, but on the indictment coupled with what was actually proved, and the conclusion which the jury came to on such proof. I find that in this case the death was shown to have arisen exclusively from one blow and assaults not proved to have been committed by the prisoners; that the assaults committed by the prisoners were prior to that blow, and, in fact, unconnected with the death, no part of "the very act or transaction" which caused the death; and therefore no part of the very act or transaction which the Crown can fairly be said to have prosecuted as a felony; especially as the "act and transaction" which did really cause the death was an assault, and was laid in the indictment but not brought home to the prisoners. If it had been brought home to them they must have been convicted of felony: it is impossible that they could have been convicted of assault, only for that assault which was really included in the felony charged, and I cannot therefore see how they could have been convicted of the other assaults charged, which were not really included in the felony charged, merely because the framer

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of the indictment chose to insert them in it. If I am right in my view of this case so far, then I think that the learned judge's summing up was right. The second jury, not being bound by the finding of the first, might have found that the assaults proved on the second trial were connected with the death; and if so, a great difficulty might have arisen. The point, therefore, was important to the prisoners: it might have been in their favour if found differently from what it was; it could not prejudice them if found as it was. Again, even if it was wrong to put the point, it was immaterial, for it lay on the prisoners to prove their plea, and in my opinion they failed altogether in doing so. Upon the whole I am clearly of opinion that the present conviction is right.

MAULE, J.—I am of opinion with my Lord Chief Justice Jervis in this case, that the prisoners were entitled to an acquittal. The prisoners, who were indicted for an assault, having pleaded that the assault was comprehended in the indictment for murder, which was denied, the question which we are now called upon to determine arose. It seems to me upon the evidence, and, indeed, upon what is not at all disputed by anybody, that the assaults charged upon the second indictment were assaults comprehended in the felonious violence charged upon the former occasion. Now the prisoners, upon the former occasion, were indicted for murdering Mary Ann Parsons by beating. There were a considerable number of counts stating various assaults, and stating, as the result of them, that the girl was murdered. Upon the second occasion no doubt was raised at all that the assaults for which it was intended to try the prisoners were the very same assaults that had been given in evidence upon the former occasion, and which were comprehended in some of the counts of the indictment upon that occasion. Now the crime charged is, I think, to be determined by looking at the indictment; the indictment is the legal charge, and there the crime is charged in several counts comprehending assaults—comprehending different assaults—comprehending, according to concession, those very assaults for which the prisoners were secondly tried. Then, they were acquitted upon the first indictment; and they were entitled to be acquitted, no doubt, upon the evidence given before my learned brother, Talfourd, upon the former trial; and no doubt could ever have entered into the mind of anybody, who knew anything about the matter, that they were entitled to be acquitted of the murder upon all those counts; and if they were, in fact, acquitted upon all those counts, they were acquitted of everything which could have been proved under any one of those counts. Now I cannot understand why, assuming that upon an indictment for homicide by violence, the parties charged may be convicted of an assault within the statute, putting aside the grave doubt which has been raised by two of my learned brothers, at least, whether, upon an indictment for homicide according to the true intent of the statute, you could upon any indictment for homicide convict of assaults; assuming that you could (which I think we must do), then it seems to me that upon every one of

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those counts in that indictment (in whatever way they were dealt with by the counsel for the prosecution upon that occasion), on every one of those assaults the prisoners were entitled to the full benefit of the acquittal—that is, just to the same benefit of acquittal as the prisoners would have been entitled to if every one of those counts had stood alone. Now, I cannot at all understand, upon the assumption that I have already mentioned, why you can make a distinction between the different counts of that indictment. I do not know that any distinction is actually made. Suppose any one of them had stood alone—for the sake of simplifying the matter—suppose a count charged an assault on the 3rd of November, which was proved to have ended in the felonious death of the deceased:—if that had stood alone, and the evidence had been given which was given in respect of the death, and the jury had been of opinion that death had been produced by that assault, they might have convicted under that one count of murder or manslaughter. It is clear, therefore, that an assault is comprehended in that count; and they might also, upon the supposition which I have adverted to, have been convicted of an assault under that count; and if the jury might have convicted the prisoners of any of the assaults, they must be taken, I think, to have acquitted the prisoners of the whole. There may be some inconvenience arising from whatever construction is put upon this act; and that the point itself is doubtful, I think, is demonstrated by the fact that there are so many of the learned judges who entertain an opinion contrary to that which I entertain myself, otherwise I certainly should have thought that it was a clear thing enough. Upon the former occasion the indictment stated, in general terms, indeed, but in terms which, it is not at all questioned, were intended to comprehend, and did comprehend, the particular transactions given in evidence on the part of the prosecution at the trial—the indictment charged those very things in several counts, and those very things in those counts were before the jury; and whether it was assault, or whether it was felony, I cannot see any ground for the reasoning that has been urged, that where there has been no charge of felony, you cannot convict or assault: that is contrary to every day's practice. It seems to me, therefore, that upon the former indictment it was quite competent for a conviction of assault to have taken place, and that, therefore, the parties were tried a second time for the same offence. The acquittal upon the former occasion seems to have taken place very much by the consent of all parties. The case seems to have failed as to the murder; and after that was decided, a conviction of the assault was not pressed; and, indeed, it is not very usual in cases of indictment for murder to press for a conviction of assault. It is very seldom, indeed, that I have known it pressed for, which is, perhaps, an argument in favour of the convenience of the interpretation which some of my learned brethren have suggested, and which would have been the true one, if we were not bound by contrary decision. I think that the prisoners had been, on the former trial, acquitted of that of which they have been convicted

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upon the second occasion, and, therefore, that the conviction is void.

ALDERSON, B.—I am of opinion in this case that the prisoners are entitled to the judgment of this court in their favour. I had thought that this question had been concluded by the opinion of the judges delivered in *Reg. v. Birch*, till I heard the opinions of my learned brethren to the contrary. But as it is now clear that the law on this point is still unsettled, it will be proper to discuss the case on principle, and to try to construe the statute itself before we examine the cases, which, it must be allowed, are not altogether consistent. The words of the statute are these:—"On the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person, if the evidence shall warrant such finding." It is clear, first, that the words "crime charged" mean crime charged as a felony; for the enactment only takes effect upon an acquittal: secondly, it is clear that the crime charged as a felony must be one which necessarily includes an assault. In other words, the assault to fall within the act must be an integral part of the felony charged. It is not necessary that it should be expressly charged on the face of the indictment. It will be sufficient if the felony charged must, of necessity, include an assault. The crimes of rape, and of cutting and wounding with intent, &c., are instances of this latter proposition. Although it is not unusual, and perhaps better, expressly to charge an assault in the indictment. But in murder and manslaughter it is necessary to do so, for murder and manslaughter do not necessarily include an assault. The cases of death by poisoning or by criminal omission are instances of this. We must, therefore, in all cases look to the charge in the indictment to determine the point. Now, in those cases where the indictment charges an assault, it does so for the most part in such general terms that it is impossible by merely looking at the indictment to identify the particular assault which is charged as an integral part of the felony. We must, therefore, often have recourse to the evidence given at the trial to identify the assault. As soon as we do this we obtain in those cases an immediate criterion. Let me suppose a case of rape. In evidence, there is given an attack upon the female by beating her. If this be connected directly with the act of obtaining possession of her person, it is an integral part of the charge of rape. If it be wholly unconnected with that attempt, it is no part of the crime charged. So again, in a charge of felonious cutting and wounding, no assault not producing a wound is any part of the crime charged as the felony. It might, indeed, be receivable in evidence in order to show a common purpose, and so to connect the person who assaulted with the felonious act of the other who wounded. But if it fails to do that, such an assault is not within the provisions of the statute. For the very statement of the assault as proved discon-

nects it with the crime charged. But suppose in these cases that there are assaults connected with the actual charge, and which actually go to the jury as a part of it, but the jury are not satisfied that the rest of the charge is made out, then the statute does apply, and the verdict of assault may follow upon such proof given, and the party may be punished for the assault mentioned in the indictment, identified by the evidence, and left to the jury as part of the felony. Thus, in *Reg. v. Brownlow* (9 Car. & P. 366), a charge of rape: there a boy was shown to have attacked a girl for the purpose of obtaining possession of her person, but being under fourteen he could not be by law, as it is said, guilty of rape. He was found guilty of assault. And yet there he was incapable of committing the felony at all. But the assault was an integral part of the rape, which was erroneously charged against him. So again in murder. The indictment charges a murder by an assault, by which a mortal injury was given. An assault is proved. But it is doubtful whether it caused death, or whether the deceased died by some pre-existing cause alone. Surely, this assault is part of the charge of murder. It must be left to the jury, in order to determine the guilt. Nothing separates it from the murder but the verdict. If opposing evidence as to the fact of its causing or not causing the death be given, this assault, as part of the murder, puts the accused in immediate jeopardy of life. And is it possible to make a legal principle out of the more or less clearness of the evidence as to the assault having caused the death? But if this be true of one assault,—and I really do not see how the case I put can be doubtful (I am sure I have known it the constant practice ever since the statute),—how are we to distinguish one assault from several assaults? If the death be charged as being caused by these assaults combined, it is surely the same as if caused by one alone. The several assaults then become as much integral parts of the charge as the one assault was before. And for this I have to cite, in addition to the reason of the thing, the very high authority of my brother Patteson in *Reg. v. Thomas Cruse and Mary his Wife*, who were charged with causing a bodily injury, dangerous to life, to a poor girl of tender age in their service, first, by striking and beating her with their hands and fists; secondly, by kicking her in the back; thirdly, by seizing her and lifting her up, and striking her head against a wooden beam; and, fourthly, by casting and throwing her on a brick floor. In that case there were four distinct assaults. The intent to murder, however, not being made out to the jury's satisfaction, the crime charged was not a felony. But the prisoners were found guilty of assault, for the assaults were all parts of the crime charged, and this ruling of my learned brother was supported by the opinion of all the judges on the case being reserved. How does this case differ in principle from the one now before us? Here, several assaults between two particular days named in the indictment were charged as together causing death: there, several assaults were charged as producing a bodily injury dangerous to

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life. Here, the assaults causing death were charged as having been committed of malice aforethought: there, they were charged as producing a dangerous bodily injury, with intent to murder. If the assaults in *Reg. v. Cruse and Wife* were part of the crime charged, the assaults in *Reg. v. Bird and Wife*, which fell within the days limited by the indictment, were part of the crime charged also. Bird and wife, therefore, were in jeopardy, under the indictment for murder, of being punished for these assaults, though not for any other assaults not included within the limits of the days fixed by the indictment. If so, the acquittal being general, *cadet questio* they may plead that acquittal in bar of a second indictment. But I understand that some of my learned brethren conceive that the two cases are distinguishable, on the ground that in the case of *Reg. v. Bird and Wife* there was given in evidence a particular blow which did cause death, and that so there was a separate felony proved, though not one committed by the prisoners. But this is, I conceive, a palpable fallacy. If the special circumstances of that blow are unknown (and that they are so is quite clear), who can properly say that such blow was felonious? To say so is in the nature of a *petitio principii*. Such a blow by an unknown hand is in law undistinguishable from a disease causing death, or any other circumstances, for which the prisoners are not responsible; and if the blow is attributed to a third person, that third person has no means of coming before the jury to explain the circumstances of the blow. This therefore is, I apprehend, a distinction without a difference. I conceive then, that the statute applies in all cases where the crime charged consists necessarily of an assault and something more, which "something more" converts the assault from a misdemeanor into a felony. Thus, if we analyze a charge of cutting and wounding, it is, first, a wounding which necessarily includes an assault; secondly, it is with one of the intents mentioned in the statute. Now the first, if proved alone, still leaves the case a misdemeanor. It is the finding of the second which alone makes it a felony. The jury, in acquitting of the felony, may therefore find the first, it proved, which is an assault. The crime of manslaughter by violence, in like manner, if divided, is, first, an assault; secondly, an assault which causes death. Of these two the felony is composed. If the second be not found, the first is an assault; if the second be found, it must in all cases be felony. If, therefore, no one can be found guilty of assault unless it be an assault which caused, or contributed to cause death, the statute can never apply to any case of murder or manslaughter at all. But, surely, it would be strange and wrong so to construe the statute. For the statute says, "any felony whatever in which the crime charged includes an assault." It would be a strange construction of it (unless we are to decide upon some supposed spirit or intention of the Legislature, casting aside the letter altogether), to say, that manslaughter by violence, a crime which clearly is a felony, and which as clearly includes an assault, is not within these express

words. But this was, in substance, the criterion put by the learned commissioner to the jury when he summed up the facts on this plea. On this narrow ground alone of the misdirection, I conceive that this conviction is clearly wrong; because the proper question was not put to the jury. But I wish, also, to express my opinion on the more general question. I proceed, therefore, to advert to some of the cases, and first to consider *Reg. v. Watkins*, which seems to me to have been decided on right principles, although I entertain a doubt whether a clause in the 1 Vict. c. 86, s. 2, not adverted to, apparently, might not make it proper to reconsider the particular case, if it should even occur again. There the prisoner was charged with breaking and entering a dwelling-house with intent to commit a rape, and also with assaulting J. S., being in the dwelling-house. The judges, when the case was reserved, thought that the whole felony consisted in the burglary, and that the assault was merely an aggravation; and so they held the assault no part of the crime charged as felony, and the conviction of assault wrong. I agree entirely with the principle, though I doubt whether, after the statute 1 Vict. c. 86, s. 2, which expressly made the whole charge, including the assault, a capital felony, the verdict ought not to have been sustained. To the above cases may be added the case of *Reg. v. Gutteridge*, and the case of *Reg. v. St. George*, where the law was, I think, clearly laid down by my brother Parke. On the high authority, undoubtedly, of *Reg. v. M'Phane and others*, which seems to me to be the true principle. These three persons were charged with feloniously cutting and wounding: as to two of them, a joint act of wounding was proved; but at this act the third prisoner was not present, nor did he concur in it; but he afterwards committed another assault on the prosecutor, and he was on the direction of the Lord Chief Justice acquitted altogether. But this was because the assault was no part of the felony charged; it was the wounding which was put to the jury. In this respect it resembles the case of *Reg. v. Phelps*, and it ought to be construed, if in the offence committed it could be shown the prisoner was a party to the offence, he would be liable to have been found guilty of the felony. Now, there are other cases to which it is necessary now to refer, in which a different opinion has been entertained. Reliance is placed on the case of *Reg. v. Phelps*, which is not so easy to be reconciled with the above view of the law. But on looking at that indictment, which is to be found in Carrington & Marshman, 180, I find that the murder there was charged by striking and beating the deceased. The point made there was, however, that the assault by Phelps was altogether disconnected with the felony. And the judges decided that of this he was improperly convicted; and I apprehend that their decision may be explained thus:—When the evidence closed there were two separate and distinct charges before the court, one of assault by Phelps alone, and the other of a joint felony at another time by Southan, and the third prisoner; these were wholly separate, the one from the other, at that time.

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The judge, I conceive, ought not to have put both to the jury; and if, as was his duty, he put one only, it was clear that he ought to put the felony to them. Phelps, therefore, ought to have been acquitted altogether. It is not like the case of one wounding, which may be a felony in one, and a misdemeanor in another, according to the proof or failure of proof of the intent with which the act was done. There, only one act goes to the jury for their decision. On this ground I conceive that *Reg. v. Phelps* may well stand as an authority without affecting this case. I cannot, however, agree with the decision on which, in this case, my brother Talfourd very naturally acted at the first trial. I allude to *Reg. v. Crumpton*, decided by my brother Patteson. That was murder by a course of ill-usage, including a beating expressly charged in the indictment. That beating was proved, though it did not contribute to cause the death. But surely it was part of those acts which were altogether charged as causing death, and so producing the murder. It is not to be presumed, as my learned brother Patteson is reported to have said, that this would lead to a fraudulent insertion in the indictment of an assault wholly disconnected with the charge. We cannot act on such a presumption. Indeed, it may perhaps be a little doubtful whether an assault charged as having with other acts not *ejusdem generis*, caused together the death, would not be so integral a part of the charge as if not proved to entitle a prisoner to an acquittal, on the ground of a variance as to the mode of death charged in the indictment. These two cases form the main difficulty, no doubt, in determining the present question. They were both prior to the case of *Reg. v. Birch*, and I think that that case, properly read and understood, decides the present question. I do not, however, mean to discuss that case now. It has been already sufficiently adverted to by my learned brethren. Upon principle, therefore, and the true construction of the statute, added to, as I think, a great preponderance of authority as to that construction, I have arrived at the conclusion, that in this case the defendants are entitled to a judgment in their favour.

PARKE, B.—The question submitted to us by the learned Commissioner of Oyer and Terminer and Gaol Delivery, in this case is, whether he was right in the direction he gave to the jury. The mode in which he states the question to have been left was this:—after telling the jury that the burthen of proof lay upon the prisoners, he directed that if they were satisfied that there were several distinct or independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown. I am of opinion that this was not the true mode of leaving to the jury the only question in issue, namely, whether the prisoner was acquitted of the felony and murder, including the same identical assaults charged in the present indictment. The proper question is, whether the prisoner could have been lawfully convicted on the former indictment of all

the assaults charged in this, and whether they were charged by that indictment with those assaults; the first branch of that question being matter of law for the judge, and the second, a question of fact for the jury. In order to support the plea of *autrefois acquit* in all cases both these circumstances must occur. It is not enough that the prisoner could have been lawfully convicted on the first indictment for the offence charged in the second, for if so, as the language of an indictment describing any offence is in general not material as to the date or place, or many other circumstances if in the same county, the indictment would be equally descriptive of many offences of a similar character, and an acquittal of the offence charged on one indictment, describing it in proper terms sufficient in point of law, would be an acquittal of every offence of the same sort in the same county against the same person; but in order to constitute a good plea of *autrefois acquit*, the plea must state, and it must be proved that the offence charged in the former indictment was the same identical offence with that charged in the indictment pleaded to. This being clearly the rule, there would not be much difficulty in applying it to an ordinary charge of felony; larceny, for instance, of the goods of A. B., or an ordinary charge of assault upon A. B. The prisoner charged on such an indictment, would have to satisfy the court first that the former indictment on which an acquittal took place was sufficient in point of law, so that he was in jeopardy upon it; and secondly that in that indictment the same offence was charged, for the indictment is in such a form as to apply equally to several different offences. To prove the identity of the offence may not always be easy, if more or less evidence is gone into on the first trial the difficulty is little; if none is offered, and the acquittal takes place, it is still an acquittal entitling the prisoner to an exemption from any subsequent trial for the same identical offence. In such a case there is more difficulty in showing what the offence charged was: but it may be proved by the testimony of witnesses who were subpoenaed to go, and did go before the grand jury by the proof of what they then swore, or perhaps by a grand jurymen himself, or by the evidence of the prosecutor, or by proof how the case was opened by the counsel for him; in short, any evidence which would show what crime was the subject of the inquiry and identify the charge, and limit and confine the generality of the indictment to a particular case. If the indictment were in a more precise form, and could be made to identify the offence charged on the face of the indictment itself and distinguish it from all others (as Scotch indictments I believe do), no such evidence would be required; but where the form is general and may apply to a great variety of charges, parol evidence is necessarily admitted to show what the charge was, and if that evidence identifies the charge, and shows what it was, its office ended for this purpose; and whether the evidence given on the former trial was true or false—whether the jury believed or disbelieved it, and what inference it drew from it, is immaterial, provided the prisoner was acquitted. The sole use of such evidence on a plea of *autrefois acquit* is

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to show what the charge in the indictment really was, and that being done, the effect of the indictment in the general form is just the same as if the offence were particularly described in it in minute terms to the exclusion of all others, and then the maxim *nemo debet bis vexari pro eadem causa* applies. No doubt the generality of the terms of the indictment leads to some inconvenience and difficulty; but it is compensated by the great advantage to the administration of justice from the greater latitude allowed to evidence on the trial which rarely, indeed never, operates to the prejudice of the prisoner, who generally knows the precise charges on his commitment. Thus far is very clear, and there is little difficulty in applying this rule to all indictments at common law. If the former indictment had been as the present is, for a certain number of assaults, and they were identical, an acquittal on that indictment would be a good bar to this. The only question would be, whether the assaults were identified by adequate evidence. But all the difficulty in this case arises from the provision in the statute 1 Vict. c. 85, s. 11, "that, on an indictment for a felony, the prisoner may be convicted of an assault," which is a departure from the clear and intelligible rules of the common law, and has produced no inconsiderable inconvenience, and amongst the rest the nice and difficult questions which have occurred upon the statute. I think that a proper construction has been put upon it by the eleven judges who decided the case of *Reg. v. Birch and another*, who were the same judges who decided the following case in Mr. Denison's Reports, p. 187. The judges, proceeding to construe this statute and ascertain what the species of assault contemplated by the 11th section was, found two classes of cases already decided. If they had held that wherever the felony charged on the face of the indictment in its nature included an assault, as rape, homicide by violence, or felonious cutting, the prisoner might be convicted of a common assault, wholly unconnected with any felony, the case in 2 Moo. Cro. C. 123 would have been wrongly decided. They held, therefore, that the indictment was not to be considered as an indictment for the offence of an assault and also of a felony. On the other hand, if the statute was to be considered as applying only to cases where the assault was committed, with intent to commit the felony charged in the indictment, to inchoate felonies proved to be such, then in all the cases in which parties had been convicted of assaults, where the charge was of felonious cutting with intent to commit murder, or grievous bodily harm, it would have been wrong, for the acquittal went on the ground that the prisoner did not intend to do either. They therefore held that the enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were of opinion that, in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also

be part of "the very act or transaction which the Crown prosecutes as a felony by the indictment." This construction having met with the concurrence of all the judges, it ought to be abided by; in my judgment it puts a correct interpretation on the words of the statute. The case of *Reg. v. Phelps*, which has been cited and much commented upon, may, perhaps, be distinguished from this case on the ground already stated by my brothers Martin and Alderson. That was a charge of murder by a joint assault or assaults charged upon three persons, and evidence was given to prove it, and one could not be in jeopardy, or convicted of a single assault at a different time, and totally unconnected with the transaction which the Crown prosecuted as a murder. But, whether distinguishable or not, it seems to me to be immaterial. If not distinguishable, I consider that *Reg. v. Birch*, which was decided afterwards upon full consideration of all the cases, and, in order to settle the rule on the subject, must prevail. But then, a difference of opinion amongst the judges arises on the construction of this, which clearly ought to be the rule. As to that part of the rule which relates to the crime charged on the face of the indictment, including an assault against the person, there is no difficulty; it applies to felonious cutting, rape, felonious homicide by violence; all of which, in their nature, include a charge of assault against the prisoner, and the charge of murder in this case includes an assault: but it must also be part of the very act or transaction which the Crown prosecutes as a murder by the former indictment. And here lies the whole difference. The learned counsel thought that to fall within the rule it must really have been, and not merely charged to have been, contributory to the death of the deceased, which the Crown charged as a murder; and many of my brethren are of the same opinion: whereas, it seems to me that it is enough to bring the assault within the meaning of this clause, if it is charged by the Crown, to be part of the very act or transaction which it charges as a felony, and it is made the subject of inquiry as such. There must be a *charge* of an assault, as parcel of a felony, not necessarily an assault *actually* being a parcel of a felony, just as in the case of a charge of a rape, an assault which the Crown charges as having been committed for the purpose of effecting it, though no rape has been committed, or a wounding charged to have been made with intent to kill and murder where no such intent has been proved, may be punished on an indictment for either felony, though in one the assault could not contribute to the rape, or in the other to the felonious wounding; for there was neither one nor the other. These assaults form part of the charge of felony made by the Crown in all these cases; they are put in a course of trial as such, though they did not in truth contribute towards any felony, for no felony was committed. Therefore, in all these cases where the charge on the face of the indictment includes an assault, that assault which the Crown means to charge by the express allegation of an assault (for we have only to deal with an express allegation in this case) as part

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of the very act which it charges as a felony, is virtually charged, and as soon as the assault which the Crown means so to charge is identified, marked and distinguished from all others by competent evidence, the case becomes exactly the same as if the indictment were expanded and the assault completely described, so as clearly to identify it. The prisoner is charged with it, and may be convicted of it on that indictment if he is acquitted of the felony: or it is only a conditional charge dependent on that fact, and if he be acquitted, he is acquitted altogether, and for ever, from the charge, and every part of it, just as if he had been indicted and acquitted of the same assault alone, fully identified by time, place, and every other necessary circumstance to distinguish it from every other assault. The evidence to identify this assault may be any evidence of the same sort as I have above stated is admissible to prove the identity of any other charge, not evidence to prove the crime or any part of it actually committed, but to prove what the offence was which the Crown did charge. Feeling quite satisfied that this reasoning is correct, it remains to apply it to the facts of the present case. A question immediately occurs whether the 11th section applies to indictments of felonies, including a single assault only, or to felonies which include many assaults. A rape or murder may include more assaults than one, and I do not feel a doubt but that in such cases, where the evidence shows that many assaults are meant to be charged as connected with the imputed murder, or rape, or felony, the prisoner may be convicted of them or any of them. Now it appears that in this case on the former trial, the Crown charged the defendants with certain assaults between certain days, which assaults it charged to be the causes of the death of the deceased, and gave evidence of them, and tried to prove that they were so. The charge in the former trial consisted therefore of these three propositions; that certain assaults were committed by the prisoners, that they were committed *malò animo*, and that they caused the death of the deceased. On the first charge they were put on their trial as well as the last, absolutely, not conditionally, *videlicet*, provided the assaults turned out to have conduced to the death; and if the assaults are identified to be the same as those charged in this indictment the prisoners were charged with and acquitted of the assaults now charged. Indeed, if the charge of assault was to be tried only in the event of the assaults appearing to the jury to have contributed to the death, I do not see how they could have been tried at all as assaults, and the prisoners convicted of them; for if they did contribute to the death the very assault which is punishable as such being a wrongful act, the offence was manslaughter at least. It is quite clear that the Legislature contemplated such an assault as may be involved in the charge of felony, and of which the prisoner could be convicted though acquitted of the felony; and how that could be, in a charge of felonious homicide, if the assault actually conduced to the death, I cannot understand. This direction of the learned commissioner seems to me, therefore, in any view of

the case, to be manifestly wrong, if the act applies to murder or manslaughter at all. A doubt has been suggested whether it does, by my brother Erie; but the words of the statute are perfectly clear, according to the ordinary rule of construction, and as they lead to no absurdity or incongruity in any view of the case, I think clearly they must be taken to include, as they expressly state, every felony. If the act does not include murder and manslaughter, the direction would be wrong: but the defendants would have been lawfully convicted of the assault in the present indictment, on the ground that charges of murder and manslaughter were to be dealt with at common law, and not under the statute. In this case, the jury acquitted of the felony, for the blows that were proved, it appeared, did not cause the death of the deceased; but the charge of assault, in my opinion, remained, and the prisoners might have been convicted of those very assaults which are charged on the second indictment; and, having been acquitted of the charge in that indictment, they are acquitted of the charge in this indictment. And it would be contrary to the wise principle of our law, that a man should be subject to more than one trial for exactly the same offence.

POLLOCK, C. B.—The question in this case turns upon the true construction of the statute 1 Vict. c. 85, s. 11, by which, for the first time, it became lawful, upon an indictment for felony, to convict of a misdemeanor; and we have to consider whether the prisoners could have been properly found guilty of an assault when on the former occasion they were tried and acquitted of the murder, for if they could have been so found guilty, they have once been in peril, and they are now entitled to our judgment on the plea of *autrefois acquit*. Under the circumstances presented for our consideration by the learned Commissioners of Oyer and Terminer, I am not surprised that there should be considerable difference of opinion in the assembled judges. We are called upon to put a construction upon an act which, in very general terms, has introduced an anomaly in the administration of the criminal law. The distinction between felony and misdemeanor is as old as the law itself, and many important consequences follow from that distinction. Before the passing of the Prisoners' Counsel Bill they were more important than they are now, but some important differences still remain. The statute has not abolished the distinction between felony and misdemeanor, whether it would have rendered the case more clear or not, or whether it, when it came to be fully considered, would not have raised a greater difficulty than we have now to contend with, I shall not pause to inquire: but the statute has introduced, in not better or clearer terms, very general power to acquit of felony and to convict of assault only where the crime charged shall include an assault, and the evidence will warrant such finding. The statute makes no specific provision for the present or any other particular case as distinguished from the general class. It does not provide specially and separately for various very different

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cases that may be suggested, as, for instance, where some felony has actually been committed by some one, but possibly not by the prisoner; or where it is left in doubt whether it was by the prisoner or not; or where it is clear that no felony has been committed, but an attempt has been made to commit one by the prisoner, or by a person not before the court; nor does it apparently make any distinction between the above cases and a case where the whole charge of felony is founded in mistake, and there has really been no felony committed at all, or even attempted, and the charge of felony is altogether an error. I think it cannot be matter of surprise, when all these various cases may arise, and the statute consists, as to this part, of a few general words only applicable to all, that much doubt may arise as to their meaning when it is necessary to apply the same words to cases differing so much the one from the other. Here we have to inquire, in the construction of this part of the act, what was in this case the crime charged, and did it include the assaults in question? If it did, the prisoners have already been acquitted, and cannot be tried again. If it did not, the former acquittal is of no avail, and the present conviction is right. I think the meaning of the words "crime charged" must be sought for in the old forms under which the jury were addressed by the officer of the court—"Your charge, therefore, is to inquire whether the prisoners be guilty of the felony," and, according to the new practice introduced by this act, the charge to the jury will be to inquire whether the prisoners were guilty of the felony and assault, or not guilty; and the question mainly turns on what would be the assault thus alluded to? It appears to me that in case where a felony (of whatever sort) has been actually committed, the charge is the felony committed, and the means whereby it was committed; and I entirely agree with the doctrine laid down by my brother Parke, in the case of *Reg. v. St. George* (9 Car. & P. 491,) that the prisoner can only be found guilty under the statute of an assault involved in and connected with the principal charge of felony. This cannot, I think, depend upon the mistake or blunder of the prosecutor, or of his counsel, or of any of the witnesses; it depends upon the fact itself, as it may come out in evidence and be found by the jury. It seems to me contrary to first principles, in administering the criminal law and in construing this act of Parliament, that an accused party who may have been guilty of a common assault, and a common assault only, never intending to commit a felony, or even contemplating it, should be liable to three year's imprisonment, and, according to some constructions of the act, to hard labour during that time, because some blundering clerk of assize has drawn an indictment, or some rash prosecutor has made an accusation, or some mistaken or incredible witness has associated by the indictment, by the accusation, or by the evidence, this simple assault with a felony, be it murder or otherwise with which felony in truth and in fact it can have no connexion whatever. In this case the charge was the murder of Mary Ann Parsons.

It appears that she came to her death by a single blow which could not by the evidence, be imputed to either of the defendants. The guilt of both might be suspected with reference even to that fatal blow, but the guilt of neither was proved, and therefore very properly both were acquitted. That very acquittal on that ground, in my judgment, disassociated all other assaults that did not tend to the death from the crime charged, and the crime charged did not include those assaults, and I think it was not lawful for the jury to convict of those assaults. It would follow from this that they were properly convicted of assault in the case now before us. I must admit the construction of the act as to this matter is by no means free from considerable doubt: the difference of opinion of the assembled judges sufficiently attests this. Many cases of difficulty may be presented either on one side or the other, and I must freely confess that I doubt whether any construction of the statute would afford a more satisfactory solution of all the difficulties that may arise in the various cases that might be suggested. During the course of the two arguments and the deliberations that have ensued, I have found it difficult to come to a conclusion which I felt to be perfectly satisfactory, but comparing the difficulties on the one side and on the other, I have at length felt it my duty to pronounce the judgment already expressed; and while I disclaim any argument or any consideration or any view of any sort founded on this particular case itself, I own I have been fortified by this consideration—that this statute is manifestly a departure from the common law; as far as its enactments are clear we are bound to obey and to enforce them, but when they become doubtful—and who shall say that this is not so?—it is safer, in my opinion, and, it is our duty, to stand by the common law.

JERVIS, C. J.—I am of opinion that the conviction in this case was wrong. The question turns upon the true construction of the statute 1 Vict. c. 85, s. 11, which in *Birch's case* (reported in Den. C. C. 185), was considered by eleven judges, who consulted all the authorities, and professed to expound the act with a precision which could not mislead. That case was principally relied upon in argument by the defendants' counsel, and ought to be a ruling authority upon the subject; but, unfortunately, some question the correctness of the rule which is there laid down, whilst others, adopting it, arrive at a conclusion altogether different from that which was intended by the framer of the rule. We cannot, therefore, take that case as conclusive upon the present occasion; and inasmuch as a reference to all the authorities has produced this most unsatisfactory result, we must, unaided by authority, endeavour to put a construction upon the statute itself. I take it for granted that in all cases where the act applies, and the evidence warrants such finding, the jury must find the prisoner guilty of assault. It is not left to their option to convict of assault or to acquit the prisoner altogether, and leave him for further prosecution in the form best suited to the justice of the case: the act is

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compulsory, and the prisoner is in jeopardy in all cases to which the act applies. Numerous inconveniences might be pointed out as the certain result of this admitted construction. The statute only applies to indictments for felony where the crime charged includes an assault. It is absolutely necessary that the crime charged should legally include an assault. Crimes of this nature are murder by violence, rape, robbery, stabbing, and the like. You cannot bring the case within the act by averring in the indictment an assault as accompanying a crime which legally does not include an assault; nor, on the other hand, is it necessary, in order to found the jurisdiction of the jury to state an assault in an indictment for a crime which legally includes an assault. It is prudent to do so, but it is not in strictness necessary; for where the crime charged includes an assault by implication, the charge of assault appears upon the indictment, and thus the rule is satisfied which requires that when the record is made up the charge should appear upon which the prisoner is found guilty, and subsequently punished. But although the crime charged does legally include an assault, it does not follow that the act may be called into operation. The jury have but a conditional power to find the prisoner guilty of the assault—they must first acquit him of the felony. The trial, therefore, throughout, is a trial for felony, to be governed by the rules which regulate such trials; and if one assault only be laid in the indictment, as the cause of death by violence, or if the crime charged in its nature, legally or in fact, include but one assault, one assault only can be produced in evidence as tending to prove the crime charged; and the prosecutor having made his election and proved one assault, cannot abandon that and produce evidence of another assault, having no relevancy to the proof of the crime charged but committed upon another occasion. So if several assaults are laid in the indictment as causing the death, or if the crime charged legally may, and in fact does, include several assaults, the same rule will prevail, subject to the same qualifications, for the trial is proceeding for felony, the evidence produced is produced to prove the felony, and is to be controlled by the rules which are applicable to trials for felony. When the whole evidence is closed, and before they can find him guilty of assault, the jury must acquit the prisoner of the felony. Upon what ground is that acquittal to take place? Surely because the evidence warrants such acquittal. The prisoner could not be guilty of the felony, if there was no felony, or if the felony was committed by another person. But the evidence which was brought forward to prove the felony, and which was insufficient for that purpose, may prove beyond doubt that the prisoner was guilty of assault. The crime charged includes an assault. The jury have acquitted the prisoner of the felony; the evidence warrants a finding of assault. What are the jury to do? The act is admitted to be compulsory. They shall “find a verdict of guilty of assault against the person indicted.” Thus reading the statute, full effect is given to the plain common-sense meaning of every word used.

I have not sought for the object of the enactment, for where there is no ambiguity, no foreign aid is necessary to expound an act; and it is dangerous to speculate upon the motives of those who may pass measures through Parliament, particularly if the plain meaning of words is to be disregarded for the purpose of effectuating that supposed intention. It is contended that the assault of which alone the jury can convict the prisoner is that included in the crime charged, and that consequently if the crime charged be committed by another, the prisoner cannot be guilty of that assault. This restriction is not, in my opinion, justified by the letter of the act, but seems to me to have been intentionally excluded from it. The jury are not to find the prisoner guilty "of the assault so included in the crime charged," nor "of the said assault," nor "of such assault," nor "of the assault," nor even of "an assault," but "of assault." If a prisoner cannot be convicted of assault where the crime charged was committed by another, because in that case the assault by the prisoner cannot be included in the crime charged, it would seem to follow that where the crime charged did not exist in fact, it could not include an assault by the prisoner. In the latter case, however, it is admitted that the prisoner might be convicted of the assault. But it is said that every felony within this act consists of an assault and something more, which makes it a felony, and that if a third party is guilty of the whole felony, including the assault, the whole charge is exhausted, and the prisoner cannot be guilty of the assault. This contention gives a meaning to the words of the statute which I think they do not bear. But, independently of that, it makes the jeopardy of the prisoner for the assault to depend upon the guilt or innocence of a third party, which must be determined in his absence by a jury who are not sworn to try that fact. In strictness, indeed, there was in this case no proof that homicide had been committed by any one. The death was caused by a blow inflicted on the child's head; whether by the prisoners or by other persons, under what circumstances, or as the mere result of a fall, was not proved, and could not legally be determined by the jury. They could only acquit the prisoners of the felony; having done so their functions, in so far as the felony was concerned, were at an end; they could not inquire by whom the felony was committed, or if a felony was committed at all. The soundness of the distinction contended for may be tested by the actual circumstances of this particular case. If it had been proved that the child had not died, it is admitted that the prisoners might have been convicted of assault upon this indictment for murder; if the death resulted from natural causes, it is admitted that the prisoners might have been convicted of assault upon this indictment for murder; if it was homicide by another, it is said the prisoners could not have been convicted of assault upon this indictment for murder. But it is only homicide if the blow was inflicted by the act of another person; if it was the result of a fall, for this purpose the death was natural. Thus, the liability of the prisoners to be convicted

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of an assault is made to depend upon a matter which the jury cannot legally settle; they can say that the prisoners are not guilty of the felony, but whether the death was felonious, justifiable, accidental, or natural, they cannot legally determine. For these reasons I am of opinion that upon the true construction of this statute a prisoner may be acquitted of the felony, and be convicted of assault upon an indictment for felony wherever the crime charged legally includes an assault; and the evidence properly admissible and produced to prove the crime charged warrants the finding of assault; and that such liability to conviction for assault does not depend upon the ground of the acquittal for felony, but will equally exist whether the felony was disproved or was shown to have been committed by a third party. It follows from this opinion, that in my judgment the proper question was not left to the jury by the learned commissioner upon this plea of *autrefois acquit*. Upon such a plea three questions arise. The first is a question of law. Is the crime charged upon the first indictment a crime of the class which includes an assault? If it is, then arises the second question—which is a question of fact—what assault or assaults was or were in fact included in the first indictment? The affirmative of this lies upon the prisoner, and from the generality of our criminal pleading, more especially in cases under this statute, where the assaults may appear upon the indictment by implication only, may be attended with much practical difficulty. If our indictments had been in the Scotch form, with a condescendence of the various assaults consummated by the felony, the task would have been easy—the mere production of the record with the acquittal of the felony would leave the charges of assault upon which the prisoner would have been in jeopardy upon the first trial clearly defined. In the absence of such assistance the prisoner must resort to the best evidence in his power. If the first case was tried out, he may prove what occurred upon that trial—the opening of counsel, the examination of witnesses, and thus show what assaults were brought forward and were legally admissible upon that indictment, as tending to prove the crime charged. If an acquittal was taken without evidence, he may for the same purpose, perhaps, prove what occurred before the grand jury when the bill was found, for such evidence is not within the oath of the grand jury, “the Queen’s counsel and their own;” or he may resort to the depositions or the instructions upon which the bill was framed. It is not necessary, however, now to enlarge further upon this subject. The same difficulty arises in a greater or less degree upon all pleas of *autrefois acquit* and *autrefois convict*, and the evidence upon such pleas in all cases must be governed by the same rules. Having designated or earmarked the assaults included in the first indictment, the third question—likewise a question of fact—occurs. Are the assaults, so designated, the identical assaults which the prosecutor professes to produce upon the second trial? This, likewise, must be proved by the prisoner; but if it is established, then the identity of the charge being made out, the prisoner was before

in jeopardy upon the same charge, and is entitled to judgment upon the plea of *autrefois acquit*. For these reasons I am of opinion that the proper question was not put to the jury; that the conviction was wrong; and that the prisoners were entitled to judgment upon the plea of *autrefois acquit*.

LORD CAMPBELL, C. J.—After long and anxious deliberation, I have come to the conclusion that in this case the former acquittal is a bar to the present prosecution. I should feel deep regret if great offenders were to escape punishment; but the due administration of criminal justice requires that the forms of judicial procedure should be observed. These forms are devised for the detection of guilt and for the protection of innocence. In the present instance the defence does not rest upon a mere technicality, but upon the sacred maxim that “no one ought to be twice vexed for the same cause.” The only question is, whether the defendants might, under the former indictment, have been lawfully convicted of the assaults for which they are now prosecuted, and it is the very same question which we should have had to consider if they had been convicted of these assaults, and the validity of that conviction had been referred to this court. A majority of the judges appear to think that the general acquittal was proper; but I am humbly of opinion that the second trial was unnecessary and unlawful. The case entirely depends upon the construction of the statute 1 Vict. c. 85, sect. 11. Let us first consider the mischief which this enactment was intended to remedy. At common law a person indicted for a felony which involved an assault must have been wholly acquitted, although proved to have committed the assault charged in the indictment, and given in evidence by the Crown as the means of committing the felony, if his attempt to commit the felony was not fully accomplished, or if a felony had been committed to which the assault did not conduce, or if no felony had been committed or attempted. This was found to be extremely inconvenient; for the prisoner, proved to have committed a grave offence of which he was accused, either got off with perfect impunity, or a new indictment was preferred against him for the same assault, and the same evidence was again given against him before another jury. In the former event public scandal was given by a failure of justice, and in the latter the accused party was unnecessarily harassed, and unnecessary expense and trouble were occasioned by a second trial. I conceive that the object of the statute was to permit, in spite of the technical rule of the common law, which forbids, under an indictment for felony, a conviction for an offence amounting only to a misdemeanor, that wherever there is an indictment for a felony involving an assault, the prisoner may be convicted of the assault charged in the indictment and given in evidence as conducive to the felony, although he be acquitted of the felony, and whether the assault was or was not, in point of fact, conducive to the felony. This surely would be a very reasonable law, both for the sake of the public and of the prisoner. To my mind it is enacted

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by the following words:—"On the trial of any person for any felony, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault, if the evidence shall warrant such finding." Soon after the act passed a construction of it was contended for, confining its operation to cases in which the assault was committed in an attempt to commit the felony charged. For this construction plausible reasons were urged, but it was—I think very properly—overruled by several solemn decisions of the judges. Thus the quality of the assault, that it shall actually be conducive to the felony, is gone; and I must confess that I can conceive no other intelligible rule to go by than that the assault shall be charged and shall be given in evidence as conducive to the felony. With these conditions the party accused has ample notice of the offence which he has to answer, and an ample opportunity of vindicating his innocence. The statute certainly did not mean practically to give the prosecutor the advantage of adding to the indictment a count for an assault unconnected with the felony; but the rule which I would lay down admits of no such perversion. The assault must be an assault against the person, and included in the crime charged; if it be, then it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of an assault, should the evidence warrant such finding. I know not why a proviso is to be introduced that the statute shall not apply where evidence is subsequently given that the assault charged and proved as conducing to the felony did not conduce to it. In the present case, the assaults which are the subject of the second indictment for misdemeanor, were expressly charged in the second and third counts of the indictment for murder, and they were actually given in evidence at the former trial, with the expressed purpose of proving the felony alleged in those counts. Moreover, when they were given in evidence, they were material and powerful proof that the crime of murder had been committed by the prisoners. Subsequently, medical witnesses of skill and credit swore that the death was caused exclusively by a blow on the head of the deceased, not shown to have been inflicted by either of the prisoners. Thereupon, my brother Talfourd most properly interposed, and advised the jury to acquit them of the murder. But, with the most sincere deference for his opinion, and that of my learned brethren who agree with him, I think he ought to have directed the jury that if they believed the medical witnesses, and acquitted the prisoners of the murder, they must direct their attention to the uncontradicted evidence proving the assaults, and find a verdict of "guilty" upon the portions of the indictment charging those assaults, should they think "that the evidence warranted such finding"—that is to say, if they believed the uncontradicted and unsuspected witnesses for the Crown, who swore to those assaults. Being once connected with the felony, and sufficient to prove it, if the death were not imputed to another cause, I do not understand when or how

they were disconnected from it and became independent and distinct assaults. Juries, in practice, defer to the opinion of the judge upon such an occasion, and a formal summing up becomes unnecessary; but if there be any evidence to go to the jury from which they might draw an inference of guilt, in strict law it is supposed to be submitted to them. The assaults proved against the prisoners were connected with the felony till the verdict of not guilty was pronounced. But it is before the verdict is pronounced, as I conceive, that the judge is to tell the jury that if they acquit of felony they may convict of assault. It is not by the verdict of "not guilty of the felony" that the judge is prevented from drawing the attention of the jury to the minor offence. The statute clearly supposes the direction to be given to the jury that if they acquit of the felony, they may find a verdict of guilty of assault, the evidence warranting such finding. In this case, morally speaking, the jury would not have been justified in disbelieving the medical evidence, and concluding that the assaults of which the prisoners were proved to have been guilty caused the death. But cases may easily be imagined in which the jury would be justified in disbelieving medical evidence, and in spite of it properly finding a verdict of guilty of the murder. How, then, can we lay down a rule that assaults once connected with the felony are to be disconnected from it by a medical opinion that they did not conduce to the death? It was hardly contended at the bar that the prisoners might not have been convicted of the assaults if it had turned out to be a case in which no felony appeared to be committed; and I cannot understand how the case is less within the statute because the evidence led to the belief that a murder had been perpetrated in which the prisoners were not implicated. A good deal of stress was laid upon the power given by the 8th section of 1 Vict. c. 85, to sentence any person found guilty of an offence within the act to hard labour and solitary confinement. But this argument was exhausted when the judges determined that the enactment about convicting of assault was not limited to assaults in an attempt to commit a felony. The power of punishing by hard labour and solitary confinement is only discretionary; and the Legislature probably thought that it might often be usefully exercised if the assault was connected with the commission of a felony, although proof were not given that the felony was attempted. In the present case, had there been a conviction for the assault at the first trial, simple imprisonment might have been generally considered an inadequate punishment for the delinquency established. I do not think it necessary to refer to the various decisions which have been commented upon by my learned brothers who have preceded me. I will content myself with observing that the most recent of these, *Reg. v. Birch*, seems to me to be an express authority for the construction of this statute. There no felony had been consummated, and the jury expressly found that the assault had not been committed with intent to rob. Yet the judges unanimously held that the prisoner

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had been properly found guilty of the assault. Could it have made any difference in that case if there had been additional evidence that after Birch, the prisoner, struck the prosecutor, a stranger was seen to give him an additional blow, to take his purse, and then to escape? I must beg the particular notice of my brethren to the replication to the plea of *autrefois acquit*, on which the issue is joined, "That the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the present indictment." The case submitted to us expressly states that the assaults for which the second indictment was preferred were given in evidence at the former trial; that "the counsel for the prosecution, in opening the case to the jury on the former trial, had opened these different assaults as conducive to the death;" and that "it was not shown on the second trial that there were any other assaults committed but those which had been given in evidence on the former trial." I am bound to say, upon this statement, the prisoners were acquitted of the same identical assaults charged in the present indictment, and are therefore entitled to our judgment. I need only very briefly advert to the argument urged by the counsel for the prosecution, that even upon the supposition that the prisoners might have been convicted of the assaults under the first indictment, yet, as the judge did not submit this question to the jury, the general acquittal does not entitle them to plead *autrefois acquit* in bar of the indictment for misdemeanor. But if they might lawfully have been convicted of the assaults at the first trial, they were then in hazard, and they are not to be again put in hazard of being convicted upon the same charge. There would be no safety for mankind if the benefit of a former acquittal might be done away with by inquiring into the terms in which the judge summed up at the former trial, although the indictment, and the evidence then given, sought to convict the prisoner of the same offence for which he is again prosecuted, and, if he were guilty of it, there was then an opportunity of establishing his guilt. It is only the ignorant and the presumptuous who would propose that a man shall be liable to be again accused after a judgment regularly given pronouncing him to be innocent. According to this novel doctrine, the Crown might a second time prosecute for high treason a person who has been acquitted of the charge by a jury of his country, and there would be no end to prosecutions for felony or misdemeanor prompted by private malevolence. I have only further to observe that I think the direction of the learned judge at the last trial was exceptionable; and I hardly see how the conviction under it can be approved by any who are not of opinion that there can only be a conviction of assault under 1 Vict. c. 85, where the assault was in an attempt to commit the felony. He told the jury that, "If they were satisfied that there were several distinct and independent assaults, some or one of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown." I am of opinion that he should only have directed

the jury to find for the Crown if there were any assault in evidence which was not included in the former indictment, and not offered in evidence at the former trial as part of the transaction, so that it might be considered an independent and distinct assault unconnected with the felony. As he directed the jury, they were bound to convict if there was any assault in evidence which did not in fact conduce to the death of the deceased, however it might have been connected with the felony, and, indeed, with whatever intent it might have been inflicted. The result of the evidence at the first trial is supposed to be that the death was caused exclusively by a blow subsequently given, which was not the subject of the second indictment. Upon this supposition, no prior assault could have conduced to the death. Therefore the jury at the last trial were obliged to find a verdict of "guilty," as none of the assaults proved did conduce to the death, although they were all offered in evidence as conducing to the death, and were substantial evidence to prove the murder. This seems to me not only to differ from my construction of the statute, but to put a narrower construction upon it than it has at any time received since the decisions that the assault need not be committed in an attempt to commit the felony. For these reasons, I think that the conviction ought to be quashed; but a majority of the court being of a contrary opinion the conviction is affirmed, and the judgment which was respited will be pronounced upon the defendants at the next assizes for the county of Devon. I hope I may, without impropriety, express a wish that the Legislature will speedily repeal or explain the enactment which has caused such confusion. Of course I am ready to abandon the construction of it for which I have been contending, and most respectfully and submissively to be governed by the opinion of my learned brethren who differ from me, but I have not been able to gather from them any clear and certain rule for my future guidance, and, I am afraid, that without the interference of Parliament, notwithstanding our best efforts to be unanimous, we ourselves, as well as others, may again find it difficult to anticipate the result of our deliberations.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

February, 1851.(Before JERVIS, C. J., ALDERSON, B., PLATT, B., WILLIAMS, J.,
and MARTIN, B.)

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*Indictment for robbery—Conviction of assault with intent to rob—Stat.
1 Vict. c. 85, s. 11.**An indictment charged that A. B., at &c., on &c., in and upon C. D. feloniously did make an assault, and him the said C. D. in bodily fear and danger of his life did put, and two pieces of current silver coin, &c., from the person and against the will of said C. D. feloniously and violently did rob, steal, take, and carry away; and that the said A. B., immediately before, at the time of, and immediately after such robbery as aforesaid, did feloniously beat and strike and use other personal violence to said C. D. contra formam statuti.**The jury found A. B. guilty of assaulting and beating C. D., with intent to rob him.**Held, that as the offence of assaulting with intent to rob was not expressly stated in the indictment, the prisoner, at common law, could not be convicted; and secondly, as an assault with intent to rob is made felony by statute, the jury were not at liberty, under s. 11 of 1 Vict. c. 85, to find the prisoner guilty of that felonious assault. The judgment was therefore arrested; but time given to prefer a new charge of assaulting with intent to rob.***T**HE following case was reserved by Martin, B.:—

At the York Winter Assizes (1850) the prisoners were tried on the following indictment:—

YORKSHIRE, } The jurors for our Lady the Queen, upon their
to wit. } oath present, that George Reid, late of the
parish of Doncaster, in the county of York, labourer, William
Ackroyd, late of the same parish, labourer, and William Rothwell,
late of the same parish, labourer, on the 18th day of September,
in the year of our Lord 1850, with force and arms, at the parish
aforesaid, in the county aforesaid, in and upon George Smith, in the
peace of God and our said Lady the Queen then and there being,
feloniously did make an assault, and him the said George Smith
in bodily fear and danger of his life then and there feloniously
did put, and two pieces of current silver coin of the realm called
shillings, and two pieces of current silver coin of the realm called
sixpences, and one silk handkerchief of the value of two shillings,
of the moneys, goods, and chattels of the said George Smith,
from the person and against the will of the said George Smith

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

then and there feloniously and violently did rob, steal, take, and carry away. And that the said George Reid, William Ackroyd, and William Rothwell, immediately before, at the time of, and also immediately after such robbery as aforesaid, did then and there feloniously beat and strike and use other personal violence to the said George Smith, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

The jury found that the prisoners were guilty of assaulting and beating George Smith, the person named in the indictment, with intent to rob him.

It was objected by the counsel for the prisoners that, upon this finding, the prisoners were entitled to a verdict of not guilty being entered for them.

I thought not, and that it was lawful to proceed to judgment against the prisoners, but at the request of their counsel, and with the concurrence of the counsel for the prosecution, I respited the judgment until the next assizes, in order that the judgment of the judges of either bench and of the barons of the Exchequer be obtained, which judgment, I request, may be given.

[This case first came on for argument on Saturday, January 18, but the court directed that it should stand over, in order that counsel might be instructed on the part of the prosecution.]

Overend, for prisoners Reid and Rothwell.—This conviction cannot be sustained either at common law or under 1 Vict. c. 85, s. 11; (Lord Denman's Act.) [ALDERSON, B.—This is very like *Vandercomb's case* (2 Leach, 816).] (b) The offence of robbery is larceny with aggravation; the foundation of the offence is larceny, but not

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(b) In *Vandercomb's case* (2 Leach, 816, 3rd edit.) the first indictment charged a burglary breaking and entering of a dwelling-house, and stealing therein. The prosecution failed to prove that the breaking and entering took place in the night-time; and they then sought to prove a larceny of the property described in the indictment on an antecedent day. This they were prevented from doing. The court said, "It seems to be a perfectly distinct felony. It appears most clearly that nothing was taken away after these men entered the house, and that there was not such a removal of any one article as will constitute an *asportavit* in contemplation of law. The indictment charges the prisoners with breaking the house and stealing the goods; and most unquestionably that charge may be modified by showing that they stole the goods without breaking open the house; but the charge now proposed to be introduced goes to connect the prisoners with an antecedent felony, committed before three o'clock on this day, at which time it is clear they had not entered the house." The prisoners being acquitted, a bill was afterwards preferred against them, which charged that they broke and entered the dwelling-house with intent to steal therein. To that indictment they pleaded *autrefois acquit*; and judgment was given against them upon that plea. Buller, J., in delivering the opinion of the judges, said, "It is quite clear that at the time the felony was committed there was only one act done, namely, the breaking the dwelling-house. But this fact alone will not decide this case; for burglary is of two sorts: first, breaking and entering a dwelling-house in the night-time, and stealing goods therein; secondly, breaking and entering a dwelling-house in the night-time with intent to commit a felony, although the meditated felony be not in fact committed. The circumstance of breaking the house is common and essential to both the species of this offence, but it does not of itself constitute the crime in either of them; for it is necessary to the completion of burglary that there should not only be a breaking, but that the breaking should be accompanied with a felony actually committed or intended to be committed; and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other. In the present case, therefore, evidence of the breaking with intent to steal was rightly held not to be sufficient to support the indictment charging the prisoner with having broken the house and stolen the goods stated in the first indictment; and if crimes are

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so as to an assault with intent to rob; there the assault is the foundation of the offence, the intent aggravation only. An assault is not necessarily included in the offence of robbery; so that at common law the prisoners could not be convicted of an assault with intent to rob, or of any assault upon this indictment. (2 East P. C. 514.) [ALDERSON, B.—The idea of robbery is not necessarily connected with the idea of an assault.] In *Reg. v. Withal and Overend* (2 East P. C. 517; 1 Leach, 102), the prisoners were indicted for feloniously and burglariously breaking and entering the dwelling-house of E. P., and stealing therein 60*l*. The jury found them not guilty of the breaking and entering the dwelling-house in the night, but guilty of stealing the money in the dwelling-house. It was objected for the prisoners that they were not excluded clergy, because the jury had acquitted them of the burglary, and there was no separate count in the indictment on the stat. 12 Anne, c. 7, for stealing in the dwelling, to the value of 40*s*. "This matter being reported to the judges in Michaelmas Term, 1773, a great majority were of opinion that where a prisoner is indicted for a complicated offence comprehending in itself divers circumstances of aggravation, each of which is ousted of clergy, though he be acquitted of some of these crimes, yet if he be found guilty of others from which the benefit of clergy is excluded, he shall receive sentence of death. As, if one be indicted of burglary and stealing a sheep, and he be acquitted of the breaking, &c., but found guilty of the sheep-stealing, no other than a capital judgment can be pronounced against him. But a few of the judges still doubting, the further consideration of the case was adjourned to Hilary Term, 1774. And in the meantime Lord C. B. Parker furnished the notes of Comer's case first beforementioned (p. 516.) Finally, all the judges were of opinion that the prisoners were ousted of their clergy by this finding, for the indictment contained every charge necessary upon the stat. 12 Anne, c. 7, namely, a stealing in a dwelling-house to the amount of 40*s*., and the jury had found them guilty of that charge." [ALDERSON, B.—Is there any instance of a man being convicted of one felony upon an indictment charging another?] Certainly not. [MARTIN, B.—But this indictment expressly charges that the prisoner *feloniously did make an assault*, and so the jury have found.] If that stood alone in the indictment, it would be a bad indictment. The word *feloniously* gives no greater effect to the word *assault* than it would have without it. [JERVIS, C. J.—The rule of the common law is, that if you fail in proving the principal offence charged in the indictment, you cannot convict of a minor offence included therein, unless that minor offence is expressly charged in the indictment; but the argument here is, that robbery is a word of art, which, at all events when laid to have been committed with violence, includes both a larceny and an assault.

so distinct that evidence of the one will not support the other, it is as inconsistent with reason as it is repugnant to the rules of law to say they are so far the same that an acquittal of the one shall be a bar to the prosecution of the other."

ALDERSON, B.—Robbery may be accomplished by threats. I take it, that the beggar in “Gil Blas” was guilty of robbery.] But then, Lord Denman’s Act (7 Will. 4 & 1 Vict. c. 85, s. 11), says that “upon the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of *assault* against the person indicted, if the evidence shall warrant such finding.” But that statute means a common assault only, included in the transaction; otherwise, upon an indictment for robbery, a prisoner might be convicted of the capital offence of stabbing with intent to murder, or cutting with intent to do grievous bodily harm, because they are all assaults. [ALDERSON, B.—Which would be contrary to *Vandercomb’s case*.] In *R. v. Watkins* (1 Car. & M. 264), burglariously breaking into a dwelling-house with intent to commit a rape was held not to include an assault, so as to fall within Lord Denman’s Act. [JERVIS, C. J.—There seems to have been an extraordinary misapprehension in that case, because the indictment actually charged a beating in the dwelling-house. Burglariously breaking into a house and assaulting a person therein is a clear felony, including an assault. ALDERSON, B.—The judges did not advert to 1 Vict. c. 86.] (a) The statute was clearly intended to apply to a misdemeanor only, because, before the statute, fifty different felonies might be included in the same indictment. [ALDERSON, B.—Stealing sheep, and killing with intent to steal, are constantly put in the same indictment.] The difficulty was, that upon an indictment for felony there could be no conviction for a misdemeanor. No instance is to be found in which, upon a charge of robbery, there has been a conviction for an assault with intent to rob, nor in which there has been a conviction for felony under Lord Denman’s Act. [JERVIS, C. J.—In *R. v. Birch* (1 Den. C. C. 185, and 2 Cox Crim. Cas. 22), it was left to the jury to say whether the assault was committed with intent.] In that case the notion of the judge was, that the prisoner could not even be convicted of the common assault, unless it was an assault committed in the attempt to rob. In *Reg. v. Button* (11 Q. B. 929, 946), it is said, “the same act may be part of several offences; the same blow may be the subject of inquiry in consecutive charges of murder and robbery; the acquittal on the first charge is no bar to a second inquiry where both are charges of felony; neither ought it to be where the one charge is of felony and the other of misdemeanor.” In this case the same act may be the subject of distinct charges,

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(a) 1 Vict. c. 86, s. 2, enacts, that “whosoever shall burglariously break and enter into any dwelling house, and shall assault, with intent to murder, any person being therein, or shall stab, cut, wound, beat, or strike any such person, shall be guilty of felony.” That was the felony charged by the indictment in *R. v. Watkins*, and it certainly included an assault. The jury found the prisoner not guilty of the burglary, but guilty of the assault. Yet, upon a case reserved, the judges held the conviction wrong, because they were of opinion that the breaking and entering a dwelling-house, with intent to commit a rape, was not a crime which included an assault; overlooking altogether the allegation of beating, which was a substantive part of the felony charged.

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one a common assault—a misdemeanor; the other an assault with intent to rob—a felony; the jury have found the latter, and the court cannot reduce the finding to a verdict of misdemeanor only. The very offence which the jury have found must be included in the indictment to warrant a conviction either under the statute or at common law.

Dearsley, for the prisoner Ackroyd.—An attempt to rob was held to be felony as late as the time of Henry 4, but afterwards to be a misdemeanor only; until by statute (7 Geo. 2, c. 21, and afterwards by 4 Geo. 4, c. 54) it was made felony: (4 Black. Com. 242.) But the attempt being the essence of the offence must be expressly charged. [ALDERSON, B.—Strike out of the indictment all which the jury have not found,—that is, the robbery—and what remains?—the assault. PLATT, B.—That is the process, when there is a conviction of larceny on an indictment for house-breaking. The jury strike out the house-breaking, and the larceny remains. Here only a misdemeanor remains.] And the jury have found a felony. *Vandercomb's case* clearly shows that an indictment for burglary, which charges a breaking and entering and a stealing, does not include a charge of breaking and entering with intent to steal. [ALDERSON, B.—Is not this a good verdict of a common assault?] The verdict must be entered upon the record according to the fact, and if so, it will stand as a conviction of felony, though the court, in awarding sentence, may treat it as a misdemeanor. Even treating it as a misdemeanor, hard labour may be part of the sentence: (*Anon.* 2 Moo. Cro. C. 40.) The record in this case would thus become evidence of a previous conviction for felony, and, upon a trial for a subsequent offence, or even upon this very charge of assaulting with intent to rob, might be used to aggravate the punishment. [PLATT, B.—You say that an assault with intent to rob is not an assault. MARTIN, B.—If, upon an indictment for an assault, the jury were to find an assault with intent to rob, would that be a verdict of acquittal?] It is submitted that it would. (d)

Argument for
the prisoners.

Hall, contra.—Assuming this not to be a good conviction for felony at common law, what is the effect of the statute? First, it applies to cases “where the crime charged shall include an assault against the person.” The indictment for robbery does include an assault *against* the person. Secondly, in such cases the jury may “acquit of the felony;” and they have acquitted in this case of the felony primarily charged, viz., robbery. Then, thirdly, they may “find a verdict of guilty of assault against the person indicted.” But some assaults are felonious, some not; and the statute makes no distinction. It only requires that the assault shall be such as is included in the nature of the crime charged. Now the assault included, in the very nature of the charge of robbery, is an assault with intent to rob. [WILLIAMS, J.—The punishment is very different in some cases, whether the conviction is for a common assault, or an assault with intent to rob; for, by

Argument for
the Crown.

(d) See *Neale's case* (1 Den. 36, *contra.*)

1 Vict. c. 87, s. 3, an assault with intent to rob by a person armed is punishable with transportation for life. ALDERSON, B.—Is there any authority for saying that upon an indictment for one felony, you can convict of another, which is not expressly alleged? The statute applies to both kinds of assault. [JERVIS, C. J.—If the statute applies it must be put in force. There is no option. Would not the effect be to let off the prisoner with a mitigated punishment for an offence which would subject him to a very severe one?] Upon this indictment the prisoners are in jeopardy of a conviction for that act of assault which is included; and, if acquitted now, may plead as to the assault *autrefois acquit* to another indictment, charging them with the assault with intent to rob; and the assault is the foundation of that charge. [ALDERSON, B.—I recollect a case in which a man was indicted for murder and acquitted. It was afterwards proposed to indict him under 1 Vict. c. 86, for burglary with beating; and I know that it was intended to plead as to the beating *autrefois acquit*, as that had been included in the charge of murder. Ultimately the charge was for burglary only, and the man was convicted: (*Gould's case*, 9 Car. & P. 364.) JERVIS, C. J.—Upon proof of homicide, there cannot be a conviction for a common assault; because, if the man dies from the blow, the offence is either murder, or manslaughter, or a justifiable assault.] Take the case of a felonious stabbing. Upon that charge the prisoner is in jeopardy of a conviction for a common assault. So upon a charge of assault with intent to rob. So upon an indictment for assault and robbery. In the two latter cases the assault is the same; and on the second indictment he would say “I have already been in jeopardy of the *minimum* offence; and that *minimum* offence is the foundation of the present charge.” [ALDERSON, B.—But the aggravation makes it a different offence. JERVIS, C. J.—It is not mere aggravation. Have the prisoners been legally in jeopardy of a conviction for an assault with intent?] They have at least been in jeopardy of a common assault; and they would be again in jeopardy of that same assault upon a second trial. [JERVIS, C. J.—How could *autrefois acquit* be pleaded to the charge of common assault? That only arises after an acquittal of the felony.] The whole verdict is given at the same time. [MARTIN, B.—It would be a very extraordinary plea to say “if I should be acquitted of the felony, then I plead *autrefois acquit* to the charge of a common assault.”] If it be not so, then the statute exposes him to that which is repugnant to the principle of English law; he may be twice in jeopardy. [ALDERSON, B.—He may be twice punished. If punished for a common assault upon this indictment, he may be then indicted for an assault with intent, again convicted of the same common assault and again punished. I should think that the prisoner might plead as to the felony not guilty, and as to the common assault *autrefois acquit*. But all the difficulty would have been avoided if the present indictment had contained, as it might have done, an express charge of assault with intent to rob, as well as of robbery.] No doubt,

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Assault with
intent to rob.
1 Vict. c. 85,
s. 11.

Argument for
the Crown.

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intent to rob.
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the proper way of drawing the indictment would be to include all the offences which the facts are capable of proving. *Overend.*—In *Reg. v. Walker* (2 M. & R. 446), a plea of *autrefois convict* of an assault, by justices, under 9 Geo. 4, c. 31, was held a bar to an indictment for a felonious stabbing, on the ground that the justices must have negatived a felonious intent. [PLATT, B.—But the acquittal of a common assault here would not meet the charge of felonious assault contained in another indictment.] That is the difficulty. It is a good conviction of assault under the statute; but the assault under the statute means the assault included in the charge, which here is a felony. [JERVIS, C. J.—In *Reg. v. Walker*, the learned judge says, “Suppose a party had been acquitted by a jury of an assault, and he was afterwards indicted for the felony which involved that assault; it is clear if he did not make the assault he could not be guilty of that which includes and depends upon the assault.” That supports Mr. Hall’s argument; but the decision may have proceeded upon the peculiar nature of the jurisdiction of the justices.] In *Reg. v. Neale* (1 Den. C. C. 36), the indictment was for a misdemeanor, in carnally knowing and abusing a girl above ten and below twelve years of age. The jury found that the act was done by force and against her will; a rape therefore was proved, yet a conviction for the statutable misdemeanor was held right. [JERVIS, C. J.—Could he have pleaded *autrefois convict* to a charge of rape? Yes, in a qualified form. He would state the facts, and show that the substance of the two offences, the *car-naliter cognovit*, was the same. At all events, whether assault in the statute means common assault or not, this is a good verdict of such an assault as is meant by the statute. The jury cannot make it a bad verdict by adding something which they ought not to add. Secondly, at common law, the verdict may be supported. It is enough to prove so much of an indictment as shows the defendant to have committed a substantive crime therein specified. That principle runs through the whole criminal law: (*R. v. Hunt*, 2 Camp. 544.) The question, therefore, depends upon what is included in the indictment. Any number of capital felonies may be included in the same indictment. [ALDERSON, B.—Formerly a great number of offenders were tried and convicted together. The jury gave one verdict in a great number of cases. JERVIS, C. J.—Yes; when I was a law officer of the Crown, I ascertained that formerly the jury used, at the end of their labours, to return their verdict in on a beadroll of cases.] Now this indictment charges a robbery with violence, and there can be no robbery without an intention to rob; and this is distinguishable from *Vandercomb’s case*, which was a case of burglary, which may be committed in two or three ways, in that respect; therefore, in this indictment, under the word “rob,” not only is the assault included but the intention. [JERVIS, C. J.—But when the larceny is struck out, so is the *animus furandi*. WILLIAMS, J.—“Rob” is improperly used in this indictment; it alleges that the goods were robbed, instead of the person. MARTIN, B.—Everything necessarily implied is

taken to be expressed, 2 Saund. 10.] If this is a bad verdict, the court will only award a *venire de novo*: (*Campbell v. Reg.* 2 Cox Crim. Cas. 463.)

Overend mentioned *R. v. Huxley* (1 Car. & M. 596.)

The learned judges retired for a short time to consider the case, and then returned into court.

JERVIS, C. J., delivered the judgment of the court.—The court desired an opportunity of consulting together upon this case, in order that we might fully understand what should be the result of our decision. Now, I am of opinion that the finding of the jury does not justify a conviction upon this indictment; and that in the result of this case the judgment ought to be arrested. There are two ways in which this is presented to the court. First, it is said that the finding of the jury amounts to a finding of a felony, which is legally and technically included in the indictment, and that, therefore, at common law, the prisoners may be properly convicted: but I think that that is not the correct view of the matter. I am of opinion that, in order to convict of a felony, not primarily charged in the indictment, it is necessary that the minor offence, so to speak, should be expressly stated in the indictment. Thus, an indictment for burglary does include a charge of house-breaking, and it also may include a charge of larceny in the house; and of these different offences, from the highest to the lowest, the party indicted may be convicted; but he cannot be convicted of an attempt to commit the principal offence. That is the rule laid down in *Reg. v. Vandercorn* and other cases. Looking, then, at this indictment, the jury have struck out that part which relates to the robbery, and all that is left is the assault. But it is said that the word *rob* includes an intent to rob as well as a robbery. I do not think so; but, at all events, the incorrect use of that word in the indictment cannot have that effect; and here the indictment alleges a robbing of the goods, not of the person. Then, secondly, can the finding be supported upon the construction of Lord Denman's Act, which says, that upon the trial of every offence which includes an assault, if the party charged is acquitted of "the felony," he may be convicted of "assault?" That means, not when on the face of the indictment an assault is stated, but where it is legally and technically included in the offence. There is no doubt this offence includes an assault; and the jury, therefore, having acquitted of "the felony," might find him guilty of "assault;" meaning thereby that offence which has all the ordinary legal incidents of assault. But they have found the prisoners guilty of assault with intent to rob, which is made felony by statute. When the record is made up it would show, therefore, a verdict of guilty of a felony not charged in the indictment; and the effect is the same as if they had found the prisoners guilty of burglary. The consequence is, that judgment must be arrested. I will not, however, certify for a few days, in order that depositions may be taken, and the prisoners be again committed upon a charge of assaulting with intent to rob. Upon that indictment they will

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Judgment.

REG. v. REID not be able to plead *autrefois acquit*, the judgment upon this
AND OTHERS. indictment being arrested.

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Judgment arrested.

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intent to rob.
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s. 11.

COURT OF CRIMINAL APPEAL.

December 30, 1850.

(Before POLLOCK, C. B., WIGHTMAN, J., WILLIAMS, J.,
TALFOURD, J., and MARTIN, B.)

REG. v. JOSEPH BARNES.(a)

Larceny by servant—False pretences.

*A. was employed to make purchases on account of his masters, and B., a fellow-servant, had instructions from them to pay out of their money all such demands as A. should make upon him in respect of such purchases. A. having falsely represented to B. that he had bought goods for the masters, and paid for them, and having thereby obtained from B. a sum of money, the property of the masters :
Held, not guilty of larceny, but false pretences.*

THIS was a case reserved by the Recorder of Canterbury. Joseph Barnes was tried before me at the last October Quarter Sessions, 1850, for the city of Canterbury, and county of the same, upon an indictment which charged that he, being servant to George Neame and another, feloniously stole 2s. 3d. the property of his masters.

The prosecutors were grocers in the city of Canterbury, and the prisoner at the time of the alleged offence had been their servant about three years. They were in the habit of purchasing large quantities of what they called "kitchen-stuff," to melt down. The course of business was for the sellers of the kitchen-stuff to take it to the prisoner upon Messrs. Neame's premises. It was his duty to receive it and weigh it, and if the chief clerk was in the counting-house, to give to the seller a ticket containing the date of the purchase, the weight, the price, the name of the seller, and the initials of the prisoner. The seller then took the ticket to the chief clerk, who paid him the price out of moneys furnished to him by the prosecutors for that purpose. In the absence of the chief clerk from the premises when any kitchen-stuff was brought,

(a) Reported by A. BITTLESTON, Esq. Barrister-at-Law.

the prisoner had authority himself to make the payment to the seller, and on afterwards producing to the clerk a ticket containing the above particulars, he repaid the prisoner out of the moneys so furnished to him by the prosecutors. The clerk was instructed by Messrs. Neame to pay all demands made by the prisoner in this way upon the production by him of the ticket, without any inquiry as to whether any stuff was bought, or as to the quantity, or whether the alleged seller was or was not a customer of the firm. Upon the evening of the 13th of September, the prisoner went to the chief clerk in the counting-house and demanded 2s. 3d., which, he said, he had paid for eighteen pounds of kitchen stuff. He produced a ticket, in the usual form, containing the name of Scott, as the seller, and 2s. 3d., as the price, and received that sum from the clerk, from the moneys so furnished to him, which the prisoner applied to his own use. There had been no such dealing as that alleged by the prisoner, nor any such payment by him, nor had the prosecutors any customer of the name of Scott.

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It was objected on behalf of the prisoners that this was not a felony, because the property in the money, and not the possession only, was parted with by the prosecutors, and that the indictment should have been for obtaining the money by false pretences, and *Mitchell's case* (2 East, P. C. 830), was relied upon. I was of opinion that although the facts might have supported an indictment for false pretences, yet that the prisoner, looking at the situation which he filled as servant to the prosecutors, was guilty of felony if the jury believed that he had obtained the money knowing at the time that he was not entitled to receive it, and had applied it to his own use. I left the facts to the jury, who found the prisoner guilty, and he was sentenced to be imprisoned for four calendar months with hard labour in the city gaol, where he now remains. I have to pray the judgment of my lords the justices and barons sitting in a court of appeal, whether the facts stated supported the indictment.

This case stood for argument on the 20th November, 1850; but no council being instructed, it was afterwards considered by the above-named judges.

Cur. adv. vult.

POLLOCK, C. B. now delivered the judgment of the court. In this case we are of opinion that the conviction is wrong, and that the indictment for stealing this money cannot be supported. There can be no doubt, upon the facts stated, that the chief clerk, when he gave the money to the prisoner, gave it with the intention of parting with it altogether. Although, therefore, the prisoner may be liable to an indictment for false pretences, he cannot be convicted of felony.

Conviction reversed.

OXFORD CIRCUIT.

WORCESTER SUMMER ASSIZES.

July 18, 1850.

(Before LORD CAMPBELL, C. J.)

REG. v. HAINES. (a)

Practice—7 Geo. 4, c. 64—*Allowance to constables.*

An application under the stat. 7 Geo. 4, c. 64, s. 28, which authorizes the court to order compensation, in certain cases, to persons who shall appear to the court to have been active in or towards the apprehension of offenders, must be founded on an affidavit of the amount actually expended.

THE prisoner was indicted and convicted for horse-stealing. At the close of the case, *W. H. Cooke*, for the prosecution, stated that he was instructed to apply to his lordship for an allowance to one of the witnesses, a constable who had used great exertions in the case in apprehending the prisoner, and establishing the case against him. The witness, in making various journies for this purpose, had been at considerable expense. Horse-stealing was one of those cases in which, by the 7 Geo. 4, c. 64, s. 28, the court was empowered to order compensation to any person appearing to the court to have been active in or towards the apprehension of offenders.

Upon an intimation from the officer of the court as to the practice, LORD CAMPBELL, C. J., said, the application must be founded on an affidavit of the party, stating the amount actually expended, and directed on that affidavit being supplied, an allowance to be made to the witness, not as a recompense for his trouble, but for the money actually so expended. (b)

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

(b) See *R. v. Jones*, 7 C. & P. 167.

Ireland.

COURT OF CRIMINAL APPEAL.

Michaelmas Term, 1850, November 6, 7, and 14.

(Before MONAHAN, C. J., PENNEFATHER, B., TORRENS, J.,
PERRIN and BALL, JJ.)

REG. v. MICHAEL WALSH. (a)

Practice — Evidence — Magistrate — Deposition of deceased person—absence of accused when information first taken—Taking down informant's statement before administration of an oath—Cross-examination of informant.

The prisoner having been arrested on a charge of poisoning S. P., a magistrate (the prisoner being kept in custody outside), first took down in writing the deposition of S. P., and then swore him to the truth of it; the prisoner being then brought into the room, he (the magistrate) slowly read over the deposition to S. P., and asked him if it was true, "and having been answered in the affirmative, he then reswore S. P. to his deposition in the presence of the prisoner, and read over the information of S. P. to him," and while he was reading it, the prisoner asked him to stop at some statement contained in it; but he told the prisoner that he had better read it over to the end, and that he would then read the deposition paragraph by paragraph distinctly to him, and that he could then put any question he wished to S. P. upon each paragraph; the magistrate accordingly so read over the deposition to the prisoner, who put several questions to the deponent which, with the answers of the latter thereto, were at the time reduced to writing and annexed to the deposition. The deponent having died, the entire document was read in evidence on the part of the Crown at the trial of the prisoner:

Held (Torrens, J., dissentiente, and Pennefather, B., dubitante), that the evidence was improperly received, inasmuch as it did not sufficiently appear from the facts above stated that the answers to the prisoner's questions had been given by the deceased under the sanction of an oath. Monahan, C. J., and Perrin, J., further holding (Torrens, J., and Pennefather, B., dissentientibus, and Ball, J., dubitante) that the evidence was inadmissible both because the information was originally taken down without an oath having been previously administered to the informant, and also because the prisoner was not present from the commencement.

The case of R. v. Smith (2 Stark. N. P. C. 210) commented on.

THE prisoner having been convicted at the Summer Assizes of 1850 for the county of Kilkenny, before Mr. Baron Pennefather, of the wilful murder of Simon Power, the learned Baron

(a) Reported by W. ST. LEGER BABINGTON, Esq. Barrister-at-Law.

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reserved the following case for the consideration of the Court of Criminal Appeal.

CASE.

Case.

The prisoner in this case was indicted and put on his trial before me at the last assizes for the county of Kilkenny, for the wilful murder of Simon Power, by administering poison to him on the 29th day of August, 1849, and having been found guilty, was sentenced to be executed on the 23rd day of November next. On the trial of the prisoner, the Crown called Wm. Cooke, Esq., resident magistrate, who produced an information sworn before him by deceased on the 7th September, 1849 (a copy of which is annexed to this case.) This information the deceased, as informant, was bound in a sum of 20*l.* to prosecute at the said assizes. Mr. Cooke, having been sworn, deposed that he was a resident magistrate of the county, and went to the house of Simon Power on the 7th September last, that he found the deceased stretched on a pallet in a very weak state, and that the prisoner at the bar, being then in custody, was brought to the house where the deceased was lying; that in consequence of the state in which Simon Power then was, he could say but little at a time, and that he first took his information without the prisoner Walsh being present, and swore Simon Power to it; that he then had the prisoner, who was handcuffed, brought in, and had the handcuffs taken off; that, owing to the exhausted state of the deceased, the prisoner had to be brought close to the bed to hear what he said; that, having then slowly read over the informations to the deceased in the presence of the prisoner, and asked Simon Power if it was true, and having been answered in the affirmative by him, he then reswore Power to his information in the presence of the prisoner, and read over the information of Power to him, and that while he was reading it, the prisoner asked him to stop at some statement contained in it, but that he (Mr. Cooke) told the prisoner he had better read it over to the end, and that he would then read the information paragraph by paragraph distinctly to him, and that he (the prisoner) could then put any question he wished to Power upon each paragraph as read; that having so read over the information, he read it over again paragraph by paragraph to the prisoner in the presence and hearing of Simon Power, and that part of it was read a third time to the prisoner; that the prisoner, having been previously duly cautioned by him, asked several questions with reference to the matters sworn in these informations, and he (Mr. Cooke) took down each question and answer, as nearly as possible in the very words of the parties themselves, a copy of which is also annexed to this case. On his cross-examination, Mr. Cooke stated that he did not then consider Power was dying.

Counsel for the prisoner objected to the admissibility of the document, either as a dying declaration or as an information made by the deceased, and relied upon the 17th section of the 12 & 13

Vict., c. 69, to sustain the latter objection; but counsel for the Crown insisted that it was properly receivable in evidence as an information duly taken in the presence of the prisoner, or as a declaration made by the deceased in the prisoner's hearing and presence, and on which he had an opportunity of observing, and called on me to allow it, with the prisoner's questions and the deceased's answers, to be read. I decided on allowing the documents to be given in evidence, and Mr. Cooke having proved them, they were read on the trial on behalf of the Crown. There was a good deal of other evidence not bearing on the question now submitted to the court, and the prisoner was convicted. At the instance of the prisoner's counsel I reserved the following questions for your Lordships' decision, viz., whether, under the circumstances detailed in this case, the information of the deceased, with the prisoner's questions and the deceased's answers to them, were properly received in evidence on the part of the Crown on the trial of the prisoner.

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(Signed) RICHARD PENNEFATHER.

September 27, 1850.

The information, and questions and answers referred to in the foregoing case, were in the following terms:—

County of Kilkenny, } The information of Simon Power, of
to wit. } Gaulstown, parish of Kilmacow, in said
county: "I was placed as a keeper or bailiff along with James
Murphy over corn and cattle under seizure for rent due by
Michael Walsh of Ballinclure. On the morning of Thursday, the
30th of August last, we met the said Michael Walsh, and he asked
us up to the house; I objected to go, fearing the women, but he
said they were not up. We went to the house, and he asked
James Murphy up to the room; after a few minutes Murphy
came down; Michael Walsh came down after him in about nine
or ten minutes, and called me up, and said, we'd want a drop out
of the bottle, and left a cup on the table for me to take. I took it,
and drank it off, supposing that it was spirits, but I perceived it
rough upon my throat, and a shocking stinking smell. I became
very sick and ill immediately, and was obliged to go out to the
back of the house, where I was sick, and discharged my stomach
violently, till I thought all was in me would come out. I have
since been very ill, and had frequent vomitings. After I drank
the whiskey I felt a burning heat in my stomach, and thought it
would burn me through. I was as well that morning as I ever
was in my life till I drank the spirits, or whatever was in the cup.
I had not been unwell for years before, and had not been taking
or using medicine of any kind. I did not take or taste anything
that morning till Michael Walsh gave me whatever was in the
cup.

"SIMON POWER."

"Sworn before me, the 7th day of September, 1849, at Gauls-
town.
"W. COOKE."

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"Bound to the Queen in 20l. to attend and prosecute in the case at next assizes, to be held at Kilkenny. Acknowledged before me, "W. COOKE."

"Simon Power having been sworn in presence of Michael Walsh, and the foregoing informations read distinctly in the hearing of both, Simon Power having sworn that it was the truth, and Michael Walsh having been duly cautioned, Michael Walsh asked informant what spite he owed him that he should give him what would injure him; Simon Power answered, "Because he did not wish them to be there at all." Michael Walsh then asked him if he did not welcome him the morning he got him in his place? Simon Power answered, "He welcomed me surely." Michael Walsh then asked Simon Power did he ever find him a bad neighbour to him? Simon Power answered, "No, he did not." Michael Walsh says that he has no other question to ask, but that he gave him a drop of whiskey out of a cup after James Murphy had drunk some on Thursday week.

"September 7, 1849.

"W. COOKE."

"SIMON POWER."

"After the above information was written and signed, Simon Power recollected that it was on Thursday, the 30th of August, that the poison was administered to him. He had first stated Friday, the 31st, which he requested might be altered in presence of Michael Walsh, the accused, and the alteration was made in his presence."

"W. COOKE."

Harris (with whom was *R. Armstrong*) for the prisoner, argued that the information was not properly receivable in evidence, either as a deposition taken in the prisoner's presence, in the manner required by law, or as a statement made in his presence, and unobjected to by him, and contended that, assuming depositions taken in the presence of the accused to be admissible in evidence in the case of the death of the deponent before the trial, by reason of the construction given by courts to the 1 & 2 Phil. & M. c. 13, and 2 & 3 Phil. & M. c. 10, extended to Ireland by the 10 Car. 1, c. 18. The law is not the same since the passing of the 9 Geo. 4, c. 54, by which the statute of 10 Car. 1 is repealed, inasmuch as the second section of that act does not prescribe that informations must necessarily be taken in the presence of the accused, in order to render them judicial acts; and that therefore it might be inferred that the Legislature did not contemplate their being employed in future in evidence; with reference to the first proposition, the case of *Rex v. Smith* (R. & R. 339, and 2 Stark, 210, and Holt, 614), it was contended, was distinguishable from the present, as in that case, though the witness was first sworn and examined in the absence of the prisoner, the oath, in that case, preceded the examination, whereas here it followed it. Upon this branch of the objection the following authorities were cited: Hawk. P. C. lib. 2, c. 46, ss. 15-17; *R. v. Payne* (1 Salk. 281, and 5 Mod. 164); *R. v. Eriswell* (3 T. R. 707), per

Lord Kenyon; 2 Stark. 212, note; *R. v. Forbes* (Holt, N. P. C. 599, note), per Chambre, J.; *R. v. Johnson* (2 Car. & Kir. 394), per Platt, B.; *R. v. Vipont* (2 Bur. 1153); *R. v. Crowder* (1 T. R. 125); *R. v. Radburn* (1 Leach, C. C. 562); *R. Dinglers* (2 Leach, C. C. 561); *R. v. Woodcock* (2 Leach, C. C. 563); *R. v. Errington* (2 Lew. C. C. 142); *R. v. Christopher* (2 Car. & Kir. 994, and 1 Den. C. C. 536); and upon the question of the non-admissibility of the information, and other statements, as a mere statement in the presence of the party accused. *Melen v. Andrews* (M. & Mal. 336, per Parke, B.; Bull. N. P. 243), and *Fenwick's case* (13 St. Tr. 595), were cited.

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The *Attorney-General* (*Hatchell*), and *Sausse*, Q. C., for the Crown, insisted that the 9 Geo. 4, c. 54, did not in this respect alter the law; that the 7 Geo. 4, c. 64 (English), corresponding to the 9 Geo. 4, c. 54 (Irish), and cases decided in England subsequent to the 7 Geo. 4, c. 64, had recognized the law as laid down in *R. v. Smith*, which occurred before the statute, and that *R. v. Smith* had been uniformly acted on. It had been followed in *R. v. Russell* (1 Mood. C. C. 356), by Lord Tenterden, who had been the single dissentient as to the admissibility of the evidence in the former case; (2 Hale, P. C. 52.) With reference to the deposition being in the nature of a statement made in the prisoner's presence without objection, it was argued that there was no reason why the fact of its having been taken in a judicial proceeding, should render it inadmissible as such, where, as here, the prisoner had an opportunity of cross-examining the deponent, and that the objection to such evidence arose where the party accused was constrained to silence, but that that objection did not apply in the present case, where the prisoner had an opportunity of interrogating the witness. The following cases were also cited: *The Attorney-General v. Davidson* (1 McClel. & Y. 169, per Hullock, B.; 2 Russ. on Cr. 890); *R. v. Arnold* (8 C. & P. 193); *R. v. Edmunds* (6 C. & P. 164.)

R. Armstrong, in reply, submitted that *R. v. Smith* did not govern the present case, for that there the witness appeared throughout to have given his testimony under the sanction of an oath, which was not the case here; that the difference between evidence given under the sanction of an oath from the first, and an unsworn statement afterwards sworn to, was very great. In *R. v. Smith*, the prisoner was introduced before the last three lines of the information were reduced to writing. He had the opportunity of hearing the witness make that portion of his statement, and *non constat* but the whole gist of the charge might have been contained therein. The prisoner was entitled to hear everything which the witness stated, and not merely that which the magistrate might have thought of importance: (2 Taylor on Evidence, 1047.) The statutes clearly contemplated an examination in the prisoner's presence, and the recent statute of 12 & 13 Vict. c. 69, s. 17, did not introduce a new law on the subject, but was declaratory of the old law. And as regarded the admissibility of the

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document as a mere statement, it would be extremely unfair by the prisoner, because the document purporting to be on oath, and not merely by parol, it would be impossible to say what additional weight it might have had with the jury, as on oath beyond what it would have had if it had gone to them simply as a statement by parol. It went to the jury as a *deposition*, and not as a mere statement.

November 12.

The court having expressed a desire to hear the case again spoken to, on this day they again assembled, when

Harris, for the prisoner, contended that, upon the case as submitted to the court, it appeared that the witness had been sworn merely to the truth of the contents of the informations, and contended that there being two modes of swearing witnesses in such cases, one a *prospective oath* to tell the truth *generally*, the other a retrospective oath as to the truth of a particular document, that it was evident that the latter mode was adopted in the present case, and that the oath was confined to the information itself; and that the cross-examination, not having been on oath, was not receivable in evidence, and therefore, the direct testimony must be rejected.

The *Attorney-General* contended that the last ground of objection could not be sustained, for that the introductory words, "Simon Power, having been sworn in presence of Michael Walsh," &c., which prefaced the statement appended to the information, showed inferentially that the answers of Simon Power, which were contained in that statement, were given under the sanction of an oath.

JUDGMENT.—*November 14.*

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Ball, J.

BALL, J.—In this case the question submitted for the decision of the court is, whether under the circumstances, the information, of the deceased, with the prisoner's questions and deceased's answers to them, were properly received in evidence. This has been argued at considerable length, and during a period of two days, and it was not until the close of the argument on the second day, that a difficulty occurred which had not been previously noticed, and it was therefore deemed proper that the Crown should have the opportunity of arguing the point. The *Attorney-General* has accordingly this day been heard on this subject, and the question has been fully discussed. It has appeared to the members of the court that two difficulties have arisen with respect to the admissibility of this evidence. The first is, that the information of the deceased was taken down and reduced to writing, without any oath having been first administered to him, and when the prisoner was not present. It appears that after this took place the prisoner was called in, and the information read over to the deceased in the prisoner's presence, and on the deceased being asked whether the contents were true, and replying in the affirmative, he was then sworn a second time to their truth in the

prisoner's presence. It is objected that the informations so sworn by the deceased were improperly received in evidence, as having been taken without an oath having been previously administered, either in the presence or the absence of the prisoner. That this proceeding was irregular in this respect, the case of *Rex v. Kiddy* (4 Dow. & Ry. 734), shows to have been the opinion of the judges in a similar case, whether the evidence should be rejected by reason of its irregularity or not. On this point there is a difference of opinion among the members of the court, but another circumstance in the case renders it unnecessary for me to decide it. Some of us consider that the case of *Rex v. Smith*, rules this case in favour of the Crown, but for my part, if it were the only question before the court, I should feel some difficulty in the way of my adopting this view. That case is undoubtedly law, and has been followed by two subsequent cases; *Reg. v. Christopher*, and *R. v. Culbert* (2 Cox C. C. 496), which have been cited by my brother Torrens. Holding, as I do, that *Rex v. Smith* is law, if the point to be decided here turned simply upon the point involved in that case, I should deem it to be my duty to consider this part of the subject more closely before coming to a conclusion. There is, however, a plain distinction between that case and the present, because there the witness was sworn before the information was given,—here, not until afterwards, and the preliminary statement here was given not on oath; this was the objection urged in *R. v. Kiddy*. It is obvious that testimony so taken labours under this disadvantage, that the witness gives it without feeling himself under the sanction of an oath, and when subsequently sworn is naturally enough unwilling to retract that which he may previously have stated. I repeat, therefore, that if the decision of this case turned on this first point, I should feel it necessary seriously to consider how far the authorities govern the present case, but on this subject it is not necessary to say more. The second point strikes me as being most material, and it appears to me to be a part of the query addressed to us by the learned judge, namely, whether not only the informations, but also the questions of the prisoner and the deceased's answers thereto, were properly received in evidence. This depends upon the question whether the prisoner had the opportunity of cross-examining the deceased on oath. If he had, I should hold the answer to be evidence just as much as the depositions. Now, to ascertain this question, as to whether such an opportunity were afforded, we must look at the evidence reported to have been given by the magistrate on the trial. The contents of the documents themselves are also very important. It is plain that the prisoner had an opportunity of cross-examining the deceased, but the question is whether the deceased was sworn when the answers were given, for I take it that unless we be satisfied that the deceased answered under the sanction of an oath, it will be our duty to decide that the questions and answers are not properly receivable in evidence. The magistrate states that he took the depositions in the first instance, in the absence of the

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prisoner, and inasmuch as a document taken in this manner would not otherwise have been available, he then called in the prisoner, and having brought him to the bedside of deceased, and having, as he states himself, "then slowly read over the information to the deceased in the presence of the prisoner," he asked Simon Power if it was true. This question having been answered in the affirmative, the deceased was resworn to his informations with respect to the truth of the contents. In 2 Burn's Justice, 464, we find the form of oath to be administered under these circumstances to be as follows, viz.: "You shall true answers make to such questions as shall be demanded of you, so help you God." This, my brother Perrin states, not to be the proper form, and in Nun and Walsh's Justice of the Peace, p. 1165, App., it is stated thus: "The evidence which you shall give to this court touching this charge against C. D. [or touching the charge in this information], shall be the truth, the whole truth, and nothing but the truth," &c. If in this instance the magistrate had been silent in his evidence respecting the form of the oath which he administered, I should have held that we were bound to conclude that it was in the usual form, and in that case the answer to the prisoner's questions would have been given under the sanction of an oath, and consequently admissible, but I am concluded by the evidence of the magistrate, as reported to us, namely, that "he reswore Power to his informations," thus confining the oath to the truth of the informations. If this be so, the subsequent questions and answers were not under oath, because the oath was restricted to the contents of the information. Is there any feature in the evidence before us warranting a different construction? The Attorney-General has relied on the statement in the informations, "Simon Power having been sworn in presence of Michael Walsh," &c.; he contends that from this we are to infer that the oath was administered in the first instance. Now if there were nothing to rebut this inference, perhaps we should arrive at such a conclusion, but that passage in itself is very equivocal, and leaves us very much in doubt as to the order of swearing, and that doubt the magistrate has removed by his evidence, by which it appears that the swearing was after the taking of the informations. Under these circumstances it appears to me that there does not exist a fair reasonable conclusion that the oath was so administered to the deceased as to bring the questions and answers under its sanction, that they were consequently not receivable in evidence, and that judgment on this ground must be given against the Crown.

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PERRIN, J.—The question in this case for the decision of the court is, whether the information was legal evidence against the prisoner? That information was taken at the time when the law on the subject was regulated by the statute 9 Geo. 4, c. 54, s. 2, and this is the first time that a similar question appears to have been raised on the construction of that particular statute in any court of justice. The corresponding English enactment, 7 Geo. 4, c. 64, s. 2, is in the following terms:—"Be it therefore enacted

that the two justices of the peace, before they shall admit to bail, and the justice or justices, before he or they shall commit to prison, any person arrested for felony, or on suspicion of felony, shall take the examination of such person, and the information upon oath of those who shall know the facts and the circumstances of the case, and shall put the same or as much thereof as shall be material into writing." The latter follows the English statutes, 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10, and the former, the Irish Act, 10 Car. 1, c. 18. There is some slight difference between the wording of the earlier and the later acts, but this is immaterial, and therefore whatever has been decided with respect to the construction of the one is plainly applicable to the other. This was held in *Errington's case* (reported in 2 Lewins, C. C. 142), which occurred subsequently to the 7 Geo. 4, c. 64. Mr. Justice Patteson there stated it to be his opinion that the reason for requiring the prisoner's presence at the examination being that he might have an opportunity for cross-examining the witnesses, it equally applied under the new statute as the old. I take it to be an established principle of law, clearly settled by judicial decision, that if the informations of the witness have been taken pursuant to the statute, they, in the event of his death previous to the trial, become legal evidence against the accused, provided they have been taken in the presence of the latter. The question to be determined therefore is, what is meant by the *presence* of the accused; the rule of law respecting the necessity of the presence of the accused is clearly laid down in 2 Hawk. P. C. c. 46, s. 23. The statutes use the words "information on oath;" it follows, therefore, that in order to be used in evidence against the party, the depositions should be given altogether under the sanction of an oath; no unsworn information ought to be taken. In *Rex v. Eriswell* (3 T. R. 721), it is laid down by Lord Kenyon that "the evidence should be given under the sanction of an oath legally administered;" and in a case which has been referred to to-day more than once, *Rex v. Kiddy* (4 Dow. & Ry. 734), it is laid down that the magistrate should administer the oath before the witness proceeds to give his information or deposition. "This is required in order that the witness shall be under the solemn obligation of an oath while he is giving his evidence, otherwise he may inadvertently, or perhaps wilfully, state some particulars erroneously in the first instance, which, when afterwards put to the test of an oath, a sense of shame may prevent him from retracting. The parties should also be sworn or affirmed to tell the *whole* truth, as it is obvious that a witness may answer every question correctly which may have been put to him, and very properly swear to the truth of the statement so taken down, so far as it goes, and yet such evidence may not contain the whole truth, and the most important point of the transaction may thus remain unknown." These are the observations of the compilers of a very useful work, Nun & Walsh's *Justice of the Peace* (p. 157.) Those observations and rule of law are the rule of Lord Tenterden

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and Mr. Justice Bailey, laid down in *R. v. Kiddy*. The court observed in that case that it "was a very irregular and improper practice in criminal cases." "Magistrates should understand that the oath is to be administered to the witness before he is examined and not afterwards:" these are the words of Abbott, C. J. "The answer of the witness is to be taken under the sanction of an oath; swearing him after his examination is taken is a very incorrect mode of proceeding, and it is hoped will be discontinued:" these are the words of Mr. Justice Bailey. On this view of the case it appears to me that this written document was improperly taken, because it was taken without the administration of an oath, but not merely so, it was not taken in the presence of the prisoner. The prisoner was kept handcuffed in another place, and here deliberately and designedly the magistrate proceeded, contrary to the rule so laid down and contrary to the fair import of the statute, to take the deposition of a party not on his oath, in the absence of the prisoner who was within call, and who was designedly kept back, and not called. Possibly the magistrate may have considered that he was doing right in thus acting. It may have worked no ill; I am merely stating a matter of fact. According to the case of *Reg. v. Forbes*, reported in a note to Holt's Reports, ruled by Mr. Justice Chambre, it is said "The intention of the statutes of Philip and Mary is sufficiently plain, it is, that the prisoner shall be present while the witness actually delivers his testimony; so that he may know the precise words he uses, and observe throughout the manner and demeanour with which he gives his testimony. I shall not admit that part of the deposition previous to the mark which was unheard by the prisoner, but that subsequent to the mark may be read." In the case of *R. v. Johnson* (2 Car. & Kir. 394) Baron Platt says, "This is a very irregular and improper mode of taking depositions, and very unfair to the party accused; the prisoner ought to hear all the questions put and answered, for then he may very possibly explain the circumstances, but it is monstrous that he should have a long bead-roll of statements read over to him, and then be asked on the sudden if he has any question to put; and then, probably unable on the instant to extract from his accuser or the witnesses an explanation of every apparently criminating circumstance, be told that he is committed; such a mode of proceeding does not afford to the party accused that fair play which the due administration of the law requires;" and he says "I am sorry to say that I had occasion to make similar remarks on the Oxford circuit." Now, if it be wrong to take informations in this manner, can the present proceeding be sustained? Here the prisoner is in handcuffs, kept apart from the proceedings, while the magistrate proceeded to take the examination from the witness, and surely nothing can be more important than for a prisoner to see the demeanour of the witness. It has been suggested that there might be inconvenience from the presence of the prisoner in the first instance, but the rules of law are strict, and the requirements of acts of Parliament, are not to depend

on convenience. It was of the utmost importance to the accused party to have the opportunity of observing the manner of the deceased whilst in the course of delivering his testimony, and without meaning to make any disparaging remarks on the conduct of the magistrate, I must say that I cannot consider the precaution of keeping out the prisoner at that period was adopted without some object in view; the very keeping out the prisoner presupposes some inconvenience from not keeping him out. Even this appears to me to distinguish the present case from the English authorities; here the exclusion was designed; there it was accidental, or at least without a purpose. In *Peake's Evidence* (p. 60), he says, referring to the statutes 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10: "On these statutes it has been holden that if in a case of felony one magistrate take the deposition on oath of any person in the presence of the prisoner, whether the party wounded, or even an accomplice, and the deponent die before the trial, the depositions may be read in evidence, but if the prisoner be not present at the time of the examination it cannot be read as a deposition taken on oath." Now, it is contended that this is admissible though not taken in his presence or hearing, because of the case of *Rex v. Smith*; that case is reported in a great number of books; I shall merely refer to the report in 2 Starkie, and it appears a very different case from that under the consideration of the court. There the clerk of the magistrates was the party making the previous examination, the oath was administered before any part of the depositions were written, and the clerk then proceeded to take down his statement, and the prisoner was brought into the room before the last three lines were taken down, and the oath was then administered to him and the depositions "were read over to the prisoner very distinctly and slowly. After this had been done the deceased was asked in the presence and hearing of the prisoner, whether what had been so written was true, and what he meant to say, and the deceased answered that it was perfectly correct. The magistrates then proceeded to examine the deceased further, and the deceased stated in the presence and hearing of the prisoner that which was stated in the last three lines of the deposition of the deceased." "The prisoner was asked afterwards whether he chose to put any questions to the deceased, but he did not ask any, he merely said, 'God forgive you, Charles.'" And Chief Baron Richards, in giving his opinion says, that he considered the evidence was admissible, since the deceased was re-sworn in the presence of the prisoner, and repeated his statement, and the prisoner therefore had had an opportunity of cross-examining him. It is possible that what he had been previously sworn to was read over as a deposition, or the evidence may have been actually repeated by the deponent. Is that at all like this case? or can it be said to govern this case? Here the prisoner was not present at the examination of the witness; the witness was not sworn at first; after his statement was taken down, he is first sworn in the

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absence of the prisoner to the statement so taken down; then the prisoner is brought in and his handcuffs taken off and the deposition read over in the hearing of the prisoner to the deceased lying on his pallet, and he is asked the question, Is that true? and he says it is; but this does not remove the difficulty that he was not sworn in the first instance, and did not give his evidence in detail, under the sanction of an oath; there is that distinction in this case, and therefore, without quarrelling with the case of *R. v. Smith*, the principle of which I am not disposed to extend, I am of opinion that this case does not come within the protection of *Rex v. Smith*, that the magistrates did not take the deposition in the presence of the prisoner so as to give him an opportunity of cross-examining, and that was not inadvertent, but deliberate, and done on purpose. With respect to the case of *Rex v. Smith*, I am not disposed to extend it. In *Reg. v. Calvert* (2 Cox C. C. 491), one of the judges stated the practice to be very improper. *Reg. v. Christopher and others* (4 Cox C. C. 76) was quite a different case, involving another question pothing at all to the same purpose. When the prisoners were first brought before the magistrate and charged with the felony, the witnesses were sworn, examined by the magistrate, and cross-examined by the prisoners, and written minutes of the examination and cross-examination were made by the clerk of the magistrate, under the inspection of the magistrate; these minutes were then sent to the office of the clerk of the magistrate, and there delivered to a clerk named Tasker, who proceeded to write the depositions from the minutes. The witnesses attended in the office, and in the course of writing the depositions Tasker put some questions to each of them, for the purpose of rendering the depositions more correct, clear, and complete; the answers given to these questions were inserted in the depositions. The magistrate was not present, nor were the prisoners, at the office of the clerk of the magistrate. The depositions having been thus written, the witnesses appeared again before the magistrate, and in the presence of the prisoners, were resworn. The depositions were read over to them, and full opportunity was afforded for cross-examination before the depositions were signed by the witnesses. The counsel for the prisoners proposed to ask one of the witnesses for the Crown the following question: "Did you not tell Mr. Tasker that you were watching the prisoner Christopher till a quarter before one o'clock?" The question had reference to what was said by the witness in answer to some question put by Mr. Tasker in the course of writing the depositions, which were not read or tendered in evidence. The question was objected to, and not allowed to be put. The only question reserved for the judges in that case was, whether that question was legal or not. The judges ruled that the question ought to have been allowed, and that an answer to it ought to have been required, so that the question in *R. v. Smith* never arose or could arise in that case; this case goes beyond the case of *Rex v. Smith*, in the circumstances which I have men-

tioned. With respect to the second point we have no satisfactory proof that the oath which was subsequently administered to the deceased extended to the cross-examination. The ground on which my decision rests is the want of the administration of an oath before the examination of the deceased; the absence of any proof that the cross-examination of the deceased was under the sanction of an oath, and that the statement was taken down in the absence of the prisoner.

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TORRENS, J.—In this case, as I entertain an opinion different from that expressed by two of my learned brethren who have preceded me, I think it right to make a few observations. There are two points raised against the validity of this conviction; first, informality, the witness not having been sworn when he was brought into the presence of the magistrate, and that subsequently, when he was sworn, the proceedings were not such as the statute of the 9 Geo. 4, c. 54 required. Now I am free to confess that the statute was not strictly complied with; but we find that a departure from the strict provisions of the statute has been the subject of judicial decisions. I do not think that the question rests any longer on the construction which we may give to the statutes, because we find legal decisions determining the very question. An opinion was at one period entertained similar to that of my brother Perrin—that, the provisions of the statute not having been pursued, the judge ought not to receive the depositions. I mean in the case of *Rex v. Forbes*, decided by Mr. Justice Chambre; that case came under the consideration of eleven out of the twelve judges in *R. v. Smith*, and the reasons of Mr. Justice Chambre were fully discussed, and the ultimate decision of the judges was that those reasons were not valid reasons, for they held that, though it was not strictly proper to depart from the strict letter of the statutes, yet that if the witness was sworn again to his information before the prisoner, it was a valid proceeding. Chief Justice Abbott, who had been supposed to differ on that occasion, in a subsequent case, gave his adherence to the majority of his brethren, though on another point also involved in that case he doubted. All cases must differ in their circumstances; but let us see what are the cardinal facts in *R. v. Smith*, and if they are not the same as here (his lordship here stated the facts.) Now I am not at all prepared to say that it is right in us to suppose that the magistrate did not do his duty, that is, to swear the witness that he had told the truth—the whole truth—and not merely that he had sworn him to the truth of what was taken down. It is said, in other words, that we are to imagine that the magistrate did not administer a legal oath on the occasion, but that he swore the witness merely to the truth of this particular deposition in the form given in 2 Burn's Justice. These observations apply more properly to the second point in the case—why should it be said that the magistrate swore the witness merely as if to an affidavit? I therefore take it in this case, that we must assume, as we have a right to do, that the magistrate did his

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duty, and accordingly administered the proper oath. If that be so, the recognised case of *R. v. Smith*, sanctioned as it is by subsequent authorities, clearly sanctions the subsequent examination, and establishes the validity of the proceedings; that case is recognised in a very recent case of *R. v. Calvert* (2 Cox C. C. 491) which was decided in 1848, and in which Baron Rolfe, having doubts, consulted his colleague, Baron Alderson. There the depositions were taken not before the magistrate at all, but by the clerk of the magistrate in a room by himself; the party then came before the magistrate, and he swore him to the truth of that statement. Now, if *Rex v. Smith* required any authority, I think it could not have a stronger. I entertain no doubt on the subject, save the doubt which I must entertain from differing from two of my learned brethren. I think that the case of *Rex v. Smith* rules this case. I come now to the second point, which presses, I know, on the mind of the court, whether we can consider the answers of the party to the questions of the prisoner as depositions, or as to be taken as distinct from the depositions. My opinion is that the whole of this document must be taken as one judicial proceeding; and that, no matter by whom propounded, the oath extends to the answers to all the questions put by a person who had authority to put them. These answers I certainly consider to be under the sanction of an oath, and I can see great danger to the criminal justice of this country (and no man has been more anxious than I have, during a long life, to adhere to the niceties of criminal justice) by holding otherwise. Entertaining the opinion that I do that it was all one proceeding, and that by the oath administered by the magistrate these answers were embraced in point of conscience and before God, I am of opinion that on both points the judgment should be affirmed.

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PENNEFATHER, B.—On the first question in this case, whether *Rex v. Smith* be law, and sanctions the reception in evidence of these documents, I am of opinion that the case ought to be decided in the affirmative on both points. I think that the case of *Rex v. Smith*, which has been recognised by different decisions of the English judges, is of itself a great authority. It has been decided by a great majority of the twelve judges, and it has since been recognised in the case of *Reg. v. Christopher*, though the point in that case may not have been the same. The case in 2 Cox C. C., of *Reg. v. Calvert*, to which my brother Torrens has referred, carries the law something further, but unquestionably by that decision the rule, as laid down in *R. v. Smith*, has been established. If *R. v. Smith* were opposed to the words of the statute, I should feel very great reluctance in giving my assent to it, but it does not appear to me to infringe on the words of the statute, which (I take from the 9 Geo. 4, c. 54 (Irish), and which are similar to the 7 Geo. 4, c. 64, and 1 Ph. & M.) are, “be it enacted, that two justices of the peace before they shall admit to bail, and one or more justice or justices, before he or they shall commit to prison any person arrested for felony, or on suspicion of felony, shall take

the examination of such person, and the information upon oath of those who know the facts of the case, and shall put the same, or as much thereof as shall be material, into writing." But no clause prescribes at what period the oath shall be administered, or that nothing shall be done before the oath is administered, and *R. v. Smith* decides that it is not necessary that the oath should be administered in the presence of the party accused, before any of those things shall be done. The material thing is, that the prisoner shall be acquainted with what has been done in his absence, and if what has been done is read over to him, it appears to me that he has substantially the benefit of cross-examination, though he did not hear what had been done before he was brought in; the witness's statement was taken down first, but the prisoner heard what had been said, and had an opportunity of cross-examining the party. That has been held to be sufficient, with the exception of the solitary case before Mr. Justice Chambre, where it is said, "that he ought to have had an opportunity of seeing what had been done from the commencement." That was the opinion of that very distinguished judge, but it was overruled. There have been some opinions given by the English judges on the subject, and some of them have dissented from the practice, but none of them have ventured to say that the decision in *R. v. Smith* was contrary to law, and with great deference to my brother Perrin, I think that the case of *R. v. Smith* in substance establishes, that this evidence was properly received. The case before Mr. Justice Chambre was before the case of *R. v. Smith*, and, as I have observed, there is no provision in the statutes which this proceeding contravenes, therefore I think that we are at liberty to adopt the opinion of the English judges. If we were to say that nothing should be asked by magistrates until an oath had been administered, I think we should in many cases defeat the ends of justice; and in many instances magistrates would be impeded in the administration of the law, if not permitted to make such inquiries. That is the view I take upon the first objection. With regard to the second objection, I own I feel very considerable difficulty, and I am not prepared to say that it is not entitled to great weight and to the judgment of the court in its favour. I think that the prisoner was entitled to have had an opportunity of cross-examining the witness, and that if such cross-examination was not on oath, then that such cross-examination ought to have been rejected, and also the original deposition, because in such case it is the same thing as if the party had not an opportunity of cross-examining, and therefore the objection is not merely to the answers but also to the depositions themselves, and that brings us to this consideration, whether these answers were given by the deceased man, Simon Power, under the sanction of an oath. Mr. Cooke, after he had taken the deposition of the deceased and sworn him to their truth afterwards, had the prisoner brought in. Here I will observe that it does not appear to me that there is any reason for saying that the prisoner was studiously kept out of the way, it was

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probably not unnaturally, that the party being in a languid state, the magistrate thought it not desirable that a small room should be crowded, and that the deceased would in the first instance communicate more freely in the prisoner's absence, and at all events there is nothing in the case to lead us to say that the prisoner was kept apart on improper grounds. I make this digression as introductory to the true consideration of the second ground of objection, namely, how far these answers are admissible as having been given under the sanction of an oath; after the prisoner was introduced, the information was read over paragraph by paragraph, and then the magistrate *reswore* the witness to his informations. These are his very words as given in the report, the question must rest upon the words of this report. He says he reswore him to his informations; now what is the meaning of that? Is it asking him is that information true? If so it could not have reference to what subsequently took place, but if he swore him to tell the truth generally, it would appear that the subsequent answers were given under the sanction of an oath; we must then consider what the circumstances were, and where the course pursued is in derogation of the common law, the Crown must strictly prove that what took place was according to the statute. It is certainly to be intended that a magistrate did his duty, but where a magistrate states that he has performed a duty, there is no intendment that he performed it in any other manner than the way in which he states that he performed it. Now the magistrate says that, having then slowly read over the information to the deceased in the presence of the prisoner, and asked Simon Power if it were true, and having been answered in the affirmative by him, he reswore Power to his information in the presence of the prisoner, and read over the information of Power to him, and that, while he was reading it, the prisoner asked him to stop at some statement contained in it, but that he (Mr. Cooke) told the prisoner he had better read it over to the end, and that he would then read the information, paragraph by paragraph, distinctly to him, and that he, the prisoner, could then put any question he wished to Power upon each paragraph so read; but it does not appear that he knew that the other questions were to be answered under the sanction of an oath. I feel great doubt on this part of the case, but it is not necessary for me to express my opinion further upon it, for even if I agreed with my brother Torrens on the point, the opinion of the majority of the court is against the admissibility of the evidence; but on this point I entertain very serious doubts that this conviction cannot be maintained.

MONAHAN, C. J.—Before the statutes, it would have been impossible to admit this evidence; though the statute does not in terms require that the prisoner should be present when the information is taken, yet it has been decided that an information, to be used in evidence, must have been taken in his presence. The courts have clearly construed the statutes as involving the necessity of

this mode of proceeding. That has been decided in *R. v. Forbes* (Holt's N. P. C. 599), on the construction of the statute 2 & 3 Ph. & M., and in *R. v. Errington* (2 Lewin's Cr. C.), a case decided after the passing of the statute of 7 Geo. 4, c. 64. As to the case of *Reg. v. Smith*, I do not read it as a case decided by the judges, on the assumption that it was not a compliance with the statute. What occurred in that case was this, that for some reason or other a witness was sworn and detailed part of his evidence in the absence of the accused; he was then brought into the room before the last three lines were taken down; and it seems to me material to consider what was done when he was brought in. The oath was then again administered to him, and the depositions were read over to the prisoner very distinctly and slowly. After this had been done, the deceased was asked, in the presence and hearing of the prisoner, whether what had been so written was true, and what he meant to say, and the deceased answered that it was perfectly correct. The magistrate then proceeded to examine the deceased further, and the deceased stated, in the presence and hearing of the prisoner, that which was stated in the last three lines of the deposition of the deceased." The prisoner was asked afterwards "whether he chose to put any questions to the deceased, but he did not ask any; he merely said, 'God forgive you, Charles.'" It appears, therefore, that though the oath was administered in the first instance in the absence of the prisoner, an oath was subsequently administered, and an information taken, in strict conformity with the act of Parliament, because it appears to me that what the act of Parliament requires is, not that a witness shall depose to a written statement, but shall, in the presence of the accused, give a statement on oath, which the magistrate shall afterwards reduce to writing, and that the accused shall also have an opportunity of cross-examining him, under the sanction of the same oath, whereby he swears to the information. In *Russell's case* (1 Moo. Cr. Cas.) 356, a precisely similar course was observed; the witness was not merely resworn to the truth of the deposition. "About half an hour after her deposition had been taken, Sarah Wormsley (the deceased) was resworn in the presence of Henry Russell (the prisoner); the deposition was repeated, and Sarah Wormsley said it was all true, and that she had made her mark to it; and the said Henry Russell, having heard the same, asked the said Sarah Wormsley if she had not wished him to get her some arsenic from Mr. Bird's? The said Sarah Wormsley said she had not." The accused evidently asked that question, and received that answer, under the sanction of an oath. It appears to me that all that the judges have decided in these two cases is, that to justify the admission of this evidence against the accused, the statute should be substantially complied with, and that in these cases it had been complied with, and that the first statement was not required to be taken in the presence of the prisoner, or on oath. But it is clearly the duty of a magistrate not to reswear a witness to an

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*Deposition
of deceased
witness.*

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old information which might have been made a month ago; but to question him and take down his answers under the sanction of an oath, and in the presence of the accused. The present case and that of *R. v. Smith* certainly agree in this point, that in both the witness was originally sworn in the absence of the accused; but the place where the present case fails on the part of the Crown is, that when the prisoner was brought in, the present information was not taken on oath in his presence. With respect to the second question before us, Mr. Cooke, in his evidence, admits that the questions and answers commenced without an oath having been administered, and that the answers were then taken down. I consider that if the case had merely rested on the evidence of Mr. Cooke, the inference plainly arises that the oath was merely an oath to the truth of the information which had been sworn. We are not at liberty to draw inferences here. If the Crown seeks to adduce evidence not receivable at common law, and where some departure takes place from the course which judges have decided to be prescribed by the statute, we are not at liberty to draw inferences in favour of the admissibility of this document; if there was any doubt as to what was the form of the oath administered, it was the duty of the Crown to have cleared up the doubt. Mr. Cooke might have been interrogated as to the form of the oath employed, and as to the fact of the cross-examination being upon oath. I need hardly say that I feel great diffidence, differing as I do from some of the members of the court; but, on the whole, I am of opinion that the judgment of the court ought to be that this conviction be reversed.

Conviction reversed accordingly.

Ireland.

COURT OF CRIMINAL APPEAL.

May 8, 1851.

(Before BLACKBURN, C. J., MONAHAN, C. J., TORRENS, BALL, JACKSON, AND MOORE, JJ.)

REG. v. THOMAS JOHNSTON. (a)

*Forgery—Indictment—Statute 39 Geo. 3, c. 63—Accountable receipt.**An indictment charged in the first count that the prisoner "feloniously did falsely make, forge, and alter a certain accountable receipt for money, which said accountable receipt is as follows :**'Ulster Bank, Branch No. 1. Enniskillen, 14th January, 1851.—We have received from the Lowtherstown Union four pounds sterling, which is placed to the credit of their account with the Ulster Banking Company, 40l.—Samuel Clarke, manager. Entered, Alex. H. Stockdale.'**—with intent to defraud the Guardians of the Poor of the Lowtherstown Union." In a second count the prisoner was charged with feloniously uttering and publishing as true a certain other false, forged, and altered accountable receipt for money (setting out the instrument as in the first count) and with the like intent. It was proved that the prisoner was a poor rate collector of the union, and that it was his duty, about the time laid in the indictment, to have lodged about 40l. with the Ulster Banking Company, who were the treasurers of the union, and were in the habit of furnishing weekly accounts, showing the sums lodged by each collector ; and it appeared that it was from such accounts so furnished that the collectors got credit in their accounts with the union ; and that, in auditing the collectors' accounts, it was not the usage to refer to the receipts to ascertain the sums lodged by them ; and it was also proved that the sum actually lodged by the prisoner was 4l., but that he, at the audit of his accounts, produced the receipt as a receipt for 40l., alleging that he had lodged that sum in the bank the day before, and that the word "four" in the body of the receipt was put in by mistake of the bank clerk. The jury having found that the prisoner altered and uttered the receipt with intent to defraud the guardians,**Held, that the document in question was an accountable receipt within the statute ; that the alteration was made in a material part, and that the prisoner having made such an alteration of the receipt as was calculated to deceive the officer of the union, was upon the evidence rightly convicted.*

FORGERY.—The following case was reserved for the consideration of the Court by the Lord Chief Justice of the Common Pleas, from the Spring Assizes of 1851, for the county of Fermanagh.

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

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CASE.

Thomas Johnston was tried before me, at the last assizes for the county of Fermanagh, on an indictment containing three counts.

The first count charged that he, on the 14th January, 14th of the Queen, at Lowtherstown, in said county, feloniously did falsely make, forge, and alter a certain accountable receipt for money, which said accountable receipt for money is as follows :— That is to say,

“Ulster Bank, Branch No. 1.

“Enniskillen, 14th January, 1851.

“We have received from the Lowtherstown Union four pounds sterling, which is placed to the credit of their account with the Ulster Banking Company.

“40*l*

SAMUEL CLARKE, Manager.

“Entd., Alex. H. Stockdale.”

with intent to defraud the guardians of the poor of the Lowtherstown Union, against the peace and statute, &c.

The second count charged the prisoner with feloniously uttering and publishing, as true, a certain other false, forged and altered accountable receipt for money, setting forth same as in the first count and with like intent.

The third count charged the prisoner with feloniously uttering and putting off a certain other false, forged and altered accountable receipt for money, with like intent as in the other counts, but not setting forth the document.

Case.

The prisoner having pleaded not guilty, the first witness for the Crown was Christopher Graham, the clerk of the poor law guardians of the Lowtherstown Union, in the said county, who stated that the prisoner was, in the month of January last, a poor rate collector of said union, and as such should, about that time, have lodged about 40*l* in the Ulster Bank, who are the treasurers of the union; that, on the 15th January, the prisoner stated to the witness, as such clerk, at his office, in the poor house in this county, that he had lodged the 40*l* in the bank the day before, and he produced and gave to witness the receipt now produced as a receipt for said sum of 40*l*. (The receipt produced was as set out in the first and second counts.) Witness had previously that morning received from the bank their usual weekly accounts, by which it appeared that the prisoner had lodged only 4*l*; and when the prisoner stated that it was a receipt for 40*l*, witness pointed out to him the word four in the body of the receipt, and stated it was a receipt only for four pounds, and that that was all he lodged. He persisted that it was a receipt for 40*l*; that that was the sum he lodged; that it was a mistake of the bank clerk to put “four” in the body; that the proper sum was in the margin; and, in corroboration of this, he pointed out that on the back of the receipt, in which the different electoral divisions are named on account of which the sums were lodged, that the several items of

the 40*l.* were specified. The entry on the back of the receipt was as follows:—

Clonelly Electoral Division...	£6	2	5
Dromore Electoral Division...	16	1	7
Tubbree Electoral Division...	17	16	0
	<hr/>		
	£40	0	0

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Witness stated that the indorsement purported to be in the handwriting of one of the bank clerks, and to show the component parts of the 40*l.*, and the different electoral divisions on account of which it was paid.

This witness, on his cross-examination, stated that the bank furnished weekly accounts, showing the sums lodged by each collector, and it was from their account so furnished that the collectors got credit in their accounts with the union.

Two clerks from the bank proved that the sum lodged was 4*l.*; that when the receipt left the bank it was a receipt for that sum; that the 4*l.* in the margin was altered to 40*l.*; and that the indorsement on the back of the receipt was altered in the following particulars:—

£1	2	5	altered to	£6	2	5
1	1	7	„	16	1	7
1	16	0	„	17	16	0
<hr/>				<hr/>		
£4	0	0		£40	0	0

When the receipt was given to the prisoner, the indorsement showed the particular electoral divisions on account of which the sums, making together 4*l.*, were paid; when the receipt was given by the prisoner to the clerk of the union, the indorsement showed how the 40*l.* was made up. Case.

These witnesses, on cross-examination, stated that the bank are treasurers for the Union, and, as such, have to make weekly returns to the guardians of the sums received and paid on their account.

For the defence, John Jewin was examined. He had been clerk of the Lowtherstown Union, and stated that the practice always had been, and was, to give the collectors credit for the bank accounts, and that the receipts were never referred to.

Mr. Johnston, counsel for the prisoner, submitted that, as the prisoner could, according to the evidence, get credit only for the sums stated in the account, and not for the amount of the receipt, it was not a receipt within the meaning of the statute or indictment. He also intimated that, as the receipt was not altered in the body, it was still a receipt only for four pounds, and, therefore, that the prisoner should not be found guilty, but that I should direct an acquittal.

I left the case to the jury, who found the prisoner guilty: stating that he made the alteration, and uttered the receipt with the fraudulent intent stated. I did not sentence the prisoner, but ordered him to be discharged, on bail, to appear at the next assizes to receive sentence, should he be required to do so; and I

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beg respectfully to refer to the judgment of your lordships, whether the alteration made by the prisoner rendered him liable to be convicted on the indictment in this case.

JAMES HENRY MONAHAN.

26th April, 1851.

R. Johnston for the prisoner.—This indictment is framed under the 39 Geo. 3, c. 33, s. 1, providing that if any person “shall falsely make, alter, forge or counterfeit, or cause or procure to be made, altered, forged or counterfeited, or willingly act, aid or assist in the false making, altering forging or counterfeiting any promissory note, or any assignment or indorsement of any promissory note, &c., or any accountable receipts, acquittance or discharge for rent or other consideration, &c., or shall falsely alter, or shall cause or procure to be falsely altered, or shall willingly act, aid or assist in the falsely altering the number, principal sum, or any part of such note or sum, or assignment or indorsement thereof, bill of exchange or acceptance, or assignment or indorsement thereof, accountable receipt or any receipts, acquittance or discharge for rent or other consideration, or any note, bill or other security for payment of money, &c., or for procuring or giving credit with intention to defraud any person or persons, bodies politic or corporate whatsoever, or shall utter or publish as true any false, forged, altered or counterfeited promissory note, &c., or any bill of exchange, &c., or any accountable receipt, or any receipt, acquittance, or discharge for rent or other consideration, &c., &c., or in any of which the number, principal sum, or any part of such note or endorsement, or assignment thereof, bill of exchange or acceptance, or assignment or indorsement thereof, accountable receipt, or any receipt, acquittance, or discharge for rent or other consideration, or any note, bill, or other security for payment of money, &c., shall have been falsely forged, counterfeited, or altered with intention to defraud any person or persons, bodies politic or corporate whatsoever, knowing the same to be false, forged, altered or counterfeited, then every such person so offending and being thereof lawfully convicted in due course of law, shall be deemed guilty of felony,” &c. The document in question is alleged in the indictment to be an “accountable receipt.” The evidence tends to show the transaction to have been solely between the bank and the person lodging the money, and that the document was not, as regards the transaction which is the subject of the indictment, an accountable receipt within the meaning of the statute; the receipt did not operate to discharge the collector of the Union as against the guardians; he was not bound to produce the receipt, and he was not entitled to credit for the sum mentioned in it, but only for such sum as might appear by the bank account to have been lodged by him; therefore the indictment cannot be supported, as the only intent laid is to defraud the guardians of the poor, though, perhaps, a count charging the intent to defraud the bank might have been sustained. [MONAHAN, C. J.—Evidence was given that the prisoner tendered the receipt

as a genuine document to the guardians of the poor; the jury found expressly that he altered it with intent to defraud them.] In the second place the receipt has not been altered in the body, or in a material part, for the indorsement is no part of the instrument, and the figures in the margin of a receipt are not an essential part, but are frequently omitted: it is still a receipt for 4*l*. [BLACKBURNE, C.J.—The question is whether the figures constitute any part of the instrument.] They either constitute no part, or else a part which is wholly immaterial. The alteration to amount to forgery must be in a material part. I have found no case exactly in point; the cases which I have met on the subject relate to bills of exchange. In *Chitty on Bills of Exchange*, p. 148, it is laid down that if there is a discrepancy between the sum in the body and the superscription, the former will prevail. *Saunderson v. Piper* (5 Bing. N.C. 426.) [MONAHAN, C. J.—One clause of the first section of the 39 Geo. 3, c. 63, comprises the case of a man's altering the instrument itself; another refers to the offence of altering the number, principal sum or part of the instrument: the present indictment is founded on the first clause of the statute, and not on the second. It might be said that an instrument is not varied unless its legal effect is varied.] In this case the legal effect is not changed: (*Elliott's case*, 2 E.P.C. 951.)

Smyly, Q.C., and *John Perrin*, for the Crown.—It was the duty of the clerk of the union to check the bank accounts and the accounts of the collector; he did audit the accounts of the collector, who attempted to practice this deceit. The alteration of the receipt was in a material part. In *Elliott's case* the figures, 50*l*., in the margin, were held to explain the omission of the word "pounds" in the body of the document: (*Young v. Grote*, 4 Bing. 253; *R. v. Teague*, R. & R. C.C. 33; S.C. 2 E. P. C. 979.)

Johnston, in reply.—A receipt is as complete a document without figures in the margin, as with them. In the present instance there is no omission in the body of the instrument.

JUDGMENT.

BLACKBURNE, C.J., delivering the judgment of the court, said, that the court had no difficulty in deciding that the receipt in question in the present case was an accountable receipt within the meaning of the statute, and that the conviction ought to be affirmed. Upon the question, as to no alteration having been made in the body of the receipt, the court were of opinion that the amount in figures, in the corner of the receipt, was a material part of the document, and that an alteration in them was sufficient to bring the party making it within the provisions of the statute. The conclusion which the court had arrived at was, that the prisoner had committed a forgery by making such an alteration in the instrument as was calculated to deceive the officer of the union.

Conviction affirmed.

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OXFORD CIRCUIT.

WORCESTER SPRING ASSIZES.

March 8, 1851.

(Before PATTESON, J.)

REG. v. TAYLOR. (a)

Arson—Evidence on one indictment of offences the subject of other charges.

On an indictment for arson in setting fire to a rick the property of A., evidence may be given of the prisoner's presence and demeanour at fires of other ricks the property respectively of B. and C., occurring the same night, although those fires are the subject of other indictments against the prisoner, such evidence being important to explain his movements and general conduct before and after the fire of A.'s rick; but evidence is not admissible of threats, statements, or particular acts pointing alone to the other indictments, and not tending to implicate or explain the conduct of the prisoner in reference to that fire.

THE prisoner was indicted for arson, by setting a rick of wheat on fire, the property of a person named Wilson, on the 3rd December, 1850, at the parish of Badsey, in the county of Worcester.

There were two other indictments against the prisoner, for firing two other ricks on the same night, the respective properties of persons named Applebee and Taylor.

Previous to the commencement of the trial, the counsel for the prosecution and for the prisoner agreed to apply to Mr. Justice Patteson for his opinion, as to how far the facts connecting the prisoner with the incendiary fires, the subject of the two other indictments, could be given in evidence on the prosecution for burning Taylor's rick.

In order that the prisoner should not be prejudiced by the discussion and the statement of the evidence in the different cases, the application to the learned judge was made out of hearing of the jury.

The facts of the case with respect to the three fires, and the prisoner's movements and general conduct on the afternoon and night on which they occurred, as given in evidence, stated concisely, were as follows:—On the afternoon preceding the fires, he had a violent quarrel with a person named Checketts, who lived in the same house with him, and afterwards he went to a neighbouring public-house. Whilst there, he used abusive language

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

respecting Checketta. He also complained that Mr. Wilson, the prosecutor, had sent a lawyer's letter to his father, for a debt of 3*l*., which the prisoner owed him; and, after much violent language, said he "would be even with him, and would light Badsey from end to end, and burn the whole lot." He left the public house about half-past six o'clock, saying he was going to Evesham; to do which he would have to pass near Mr. Applebee's rick yard, and also near Mr. Wilson's. One witness stated that the prisoner was at home from half-past six o'clock to seven o'clock. At seven o'clock a rick, in Mr. Applebee's yard, was discovered to be on fire, but was soon put out. At half-past seven o'clock, an alarm was given that a rick in Mr. Wilson's yard, about half a mile distant, was on fire; and several persons, who had been assisting at Mr. Applebee's, with others, ran to assist in quenching that fire also. Almost immediately after these persons arrived in the yard, some of them saw the prisoner come out of an orchard into the rick yard, and he said that he heard the cry of fire on the Evesham road, and, in running to the place, had jumped in the mill pond, and was consequently wet through. The persons to whom he was speaking thereupon looked at his dress, and they said that a blue smock, which he had on, was perfectly dry, and that they did not perceive any signs of wet on his trousers. The prisoner assisted in putting out the fire, and afterwards went into the house and had some cider, and he was seen in the house at eleven o'clock, but not afterwards. In the meantime, he appeared to have returned home, which was between Mr. Applebee's and Mr. Taylor's rick yards, and had changed his clothes, and a policeman, who had met him on the road, said that his frock was then very wet.

At half-past twelve o'clock, another cry of fire was given, and it was discovered that a rick belonging to the prisoner's uncle, at Wickhamford, which is at the other end of Badsey to Mr. Wilson's (Mr. Applebee's rick yard being about half-way between them), was on fire also. The persons at Mr. Wilson's immediately proceeded to Mr. Taylor's rick yard, and on their road they met the prisoner, between his own house and Mr. Wilson's, running towards Mr. Wilson's. He asked them where they were going, and, on being told that his father's or his uncle's ricks were on fire, replied, "Not it, not it," and, although they pointed to the light in that direction, proceeded on his way to Mr. Wilson's. One witness, however, said that the prisoner added, "If it is so, I will go back with you, but don't make a fool of me," and it was clearly proved that he was at his uncle's rick yard a very few minutes after the others, and that he fetched a ladder and placed it against the rick, although the other persons present thought the fire too much ahead for their services to be useful. The next day, in conversing at the public house, he said the fire at Wilson's was "badly done;" he wished the whole had been burnt down, for he was an old devil. He also made several very contradictory statements as to where he had been, and what he had done, all which circumstances, taken together, occasioned his apprehension.

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PATTESON, J., having heard an outline of the cases, said his opinion was that, on the part of the prosecution, evidence might be given on the indictment, for setting fire to Wilson's rick, of the movements of the prisoner and his general conduct during the whole of that evening, including the facts of his presence and demeanour at the other fires the subject of the two other indictments, but that evidence ought not to be given of threats, statements and particular acts, pointing alone to those other charges, and not tending to implicate or explain the conduct of the prisoner in reference to the fire at Wilson's.

The effect of the learned judge's opinion, intimated in this manner, was, that evidence was given of which the above is a summary. The only evidence in the possession of the prosecution, in reference to either charge, which was not adduced on the indictment on the prosecution of Wilson, consisted of threats and expressions directed against Taylor and Applebee.

The jury acquitted the prisoner.

No evidence was offered on the other indictments.

Huddleston and Richards for the prosecution.

W. H. Cooke and Powell for the prisoner.

OXFORD CIRCUIT.

WORCESTER SPRING ASSIZES.

March 10, 1851.

(Before TALFOURD, J.)

REG. v. GARDNER. (a)

Costs of prosecution—Indictment under statute 8 & 9 Vict. c. 109, s. 17.

An indictment under the statute 8 & 9 Vict. c. 109, which enacts that every person who, by fraud, or unlawful device, or ill practice in playing at cards, &c., shall win from any other person any sum of money or valuable thing, "shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof, shall be punished accordingly," is within the meaning of the statute 7 Geo. 4, c. 64, s. 23, which empowers the court to order the costs of prosecutions and indictments (inter alia) for "knowingly and designedly obtaining any property by false pretences."

THE indictment contained eight counts. Of the first six some alleged that the prisoner, with one James Bristaw, and another person unknown, conspired to cheat and defraud Robert

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

Hopkins, and did actually cheat and defraud him of the sum of five pounds, setting out the overt acts in various ways, alleging them to be, the inducing Hopkins to play at divers games of cards and using packed cards. Others of the six counts alleged the conspiracy to be to defraud Charles Royston, and the actual cheating and defrauding him of twenty pounds by similar means.

The seventh and eighth counts were framed under the statute 8 & 9 Vict. c. 109, s. 17, and respectively charged the prisoner with having won from Hopkins the sum of five pounds, and from Royston the sum of twenty pounds, by means of unlawful devices, to wit, by packing and arranging the cards.

The jury having returned a general verdict of guilty,

Huddleston (for the prosecution) made an application to the learned judge that the costs of the prosecution should be taxed and allowed by the officer of the court.

TALFOURD, J., observed that the court had no power to grant the costs of a prosecution for conspiracy.

Huddleston begged to call his lordship's attention to the language of the 17th section of the 8 & 9 Vict. c. 109. That section enacts "That every person who shall by any fraud, or unlawful device, or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly." Now the statute 7 Geo. 4, c. 64, s. 23, which enumerated the particular description of misdemeanors in which power is conferred on the court to allow the costs of prosecutions, expressly specified indictments for knowingly and designedly obtaining any property by false pretences. He submitted that this indictment was in substance an indictment for obtaining property, namely, money, by false pretences, and was, consequently, a prosecution in which the prosecutor was entitled to costs.

TALFOURD, J. said he felt that this was a case in which he ought to allow the costs if he had the power. He would consult Mr. Justice Patteson (who had left Worcester), and intimate the result at Stafford.

At the sitting of the court at Stafford, on the 12th March, Mr. Justice Talfourd said, "I have consulted my learned brother, Mr. Justice Patteson, with respect to the case of John Frederick Gardener, tried at Worcester on Saturday last, and he is of opinion with me that the two last counts of the indictment did, in fact, amount to a charge of obtaining money by false pretences, and that I have power to order costs in this case, which I accordingly do. I should much regret if I had not had the power."

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—
Practice—
Costs of
prosecution.

OXFORD CIRCUIT.

STAFFORDSHIRE SPRING ASSIZES.

March 13, 1851.

(Before TALFOURD, J.)

REG. v. DUNNING AND ANOTHER. (a)

*Reward for diligence in the apprehension of offenders—Stat. 7 Geo. 4, c. 64, s. 28.**A person residing in a house broken into by burglars, and who, by fastening them in a room, detains them there until assistance is obtained, and the capture of the offenders effected, is within the meaning of the statute 7 Geo. 4, c. 64, s. 28, which enables the court to order payment by way of compensation to any person who appears to have been active in the apprehension of offenders.*

THOMAS DUNNING and Thomas Woolman pleaded guilty to an indictment charging them with burglariously breaking and entering the dwelling house of Elizabeth Holmes on the 27th of January, 1851, at the parish of Rushall, and stealing therein one sovereign balance and case, one jacket, and other articles, the property of William Holmes, and therein also assaulting with intent to murder the said William Holmes.

Vaughan, who appeared for the prosecution, applied to the court to award William Holmes some recompense, under the peculiar circumstances of the case.

It appeared from the depositions, that about two o'clock on the night of the above day, the prisoners broke into the house of the prosecutor, who is a farmer, living at a hamlet called the Butts, in the above parish, by cutting six panes of glass out of the kitchen window. When they had got in, they collected into a bundle all the property they thought worth removing in the lower part of the house and drank two or three bottles of elder wine and a quantity of beer. They then took up, the one a constable's staff, which belonged to William Holmes, the brother-in-law of the prosecutrix, and the other the iron bar of one of the windows, and proceeded up stairs to William Holmes's bedroom, and in the dark began to strike at him while he lay asleep, and then inflicted three severe wounds on his head. He got up, struggled with them, wrested his staff from the one, and struck about right and left, and got outside the door and shut it, keeping the prisoners inside and shouting aloud for assistance. One of his nieces ran out and

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

brought in some of the neighbours, and they all then went into the room where the prisoners were detained, and there they were found lying on the ground quite drunk. They were, of course, secured. The wounds inflicted on William Holmes were so very severe that they produced concussion of the brain, and altogether so injured him that he was not able to leave his bed till yesterday, when he was brought here, and it was probable he would never recover. He had been obliged to have medical and surgical attendance ever since the event, and he could ill afford the expense.

TALFOURD, J.—The circumstances under which the statute enables the court to order payment by way of compensation, are where any person shall appear to have been active in the apprehension of offenders.(a) Is this a case within the statute?

Vaughan called attention to the fact that it was by the presence of mind and activity of Holmes in closing the door upon the prisoners, and keeping them there until assistance came, their apprehension was effected.

After referring to the act of Parliament, the learned judge said he was of opinion that by giving a liberal interpretation to the language of the statute, the present case was brought within it, and he accordingly ordered the sum of 10*l.* to be given to William Holmes.

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v.
DUNNING AND
ANOTHER.

1851.

*Reward for
apprehension
of offenders.*

(a) 7 Geo. 4, c. 64, s. 28, which, "for the better remuneration of persons who have been active in the apprehension of certain offenders," enacts, "That where any person shall appear to any Court of Oyer and Terminer, Gaol Delivery, &c., to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at or attempting to discharge any kind of loaded fire-arms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse stealing, bullock stealing, or sheep stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen, every such court is hereby authorized and empowered in any of the cases aforesaid to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension," &c.

OXFORD CIRCUIT.

STAFFORDSHIRE SPRING ASSIZES.

March 18, 1851.

(Before Mr. GREAVES, Q. C.)

REG. v. WHITEHOUSE. (a)

Manslaughter—Indictment—Variance.

An indictment for manslaughter alleged that the prisoner, P. W., having the care and management of a certain steam engine employed in winding up and letting down the shaft of a coal pit an instrument called a skip, containing certain persons, did, whilst the said persons were so to his knowledge in the said skip, and ascending in the shaft of the said pit, so carelessly, negligently, and feloniously conduct himself, &c., that J. W., the deceased, "then and there being one of the said persons in the said skip, and ascending in the shaft of the said pit as aforesaid, was then and there, by and through the felonious carelessness of the said P. W. in that behalf, involuntarily, and with great force and violence, drawn, cast, and thrown over a certain pulley then and there necessarily used with the said steam engine in the working of the said pit."

Held, that the indictment was not supported by proof that after the skip had emerged from the shaft it was, in consequence of the prisoner not stopping the engine sufficiently soon, drawn up violently against a pulley placed several yards directly above the mouth of the shaft connecting the skip with the engine, by means of which the deceased was thrown out and killed.

THE prisoner was indicted for manslaughter. The indictment was as follows:—

Indictment.

"Staffordshire, } The jurors, &c., present that Paul Whitehouse, to wit. } late of, &c., on the 19th day of October, A.D. 1850, with force and arms, &c., at, &c., in, &c., in and upon one Joseph Rowley, in, &c., then and there being, feloniously did make an assault, and that the said Paul Whitehouse then and there having the care and management of a certain steam engine, called a whimsey, then and there being of and belonging to and used with a certain coalpit there (*and which said steam engine was then and there necessarily used and employed in and about the working, winding up, and drawing up from and out of the shaft of the said pit, and also in and about the working and letting down the shaft of the same pit,* a certain instrument and implement called a skip, and in which said skip certain persons were then and there, to the knowledge of the said Paul Whitehouse, *ascending in the shaft*

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

of the said pit), he the said Paul Whitehouse did then and there, and whilst he the said Paul Whitehouse had the care and management of the said steam engine as aforesaid, *and whilst the said persons were so to his knowledge in the said skip, and ascending in the shaft of the said pit* as aforesaid, to wit, on, &c., so carelessly, negligently, and feloniously conduct himself in and about the care and management of the said steam engine, so belonging to and used with the said pit as aforesaid, that he the said Joseph Rowley then and there being one of the said persons in the said skip, *and ascending in the shaft of the said pit as aforesaid*, was then and there, by and through the felonious carelessness, &c., of the said Paul Whitehouse in that behalf involuntarily, and with great force and violence, drawn, cast, and thrown over a certain pulley then and there necessarily used with the said steam engine in the working of the said pit, down to and upon the ground," &c.

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—
Manslaughter
—Indictment.

From the evidence on the part of the prosecution, it appeared that the prisoner was an engine-man, whose duty it was to regulate the motions of the steam engine employed to draw the skip bringing up the miners from a coal-pit; the skip being attached to a rope which passes over a pulley about five or six yards above the mouth of the shaft and then over roller-posts, with pulleys on them, to a drumstick, near the engine-house, around which it is coiled by the action of the engine. When the skip has ascended to within about thirty yards of the shaft's mouth, the practice is for the ascending miners to shout out "mind!" which signal is immediately repeated by the banksman to the engine-man, and about the same time a wire, which communicates with the rope and the engine-house, sets a bell attached to the engine in motion, and thereby also gives notice to the engine-man. The banksman, as soon as the skip reaches the surface, moves a sliding platform, called a "runner," over the mouth of the shaft, and the miners then alight. On the present occasion the prisoner had been told by the banksman that there were no more men in the pit, and he was about to leave work, and had disconnected the bell from the engine, but being afterwards told there were men to be brought up, he said with an oath, "There was always something to be done at that pit," and let the skip down for them and drew them up.

It appeared from the statement of one of the survivors that the miners ascending did not cry out "mind" until they were within seven or eight yards of the mouth of the shaft, and the signal being repeated by the banksman to the prisoner, he stopped the engine, but not in time to prevent the skip being drawn violently up to the pulley. Two or three of the deceased men, seeing the danger they were in, jumped off the skip, and the banksman not having (as he stated) had time to push the runner over the shaft, they fell down it into the pit and were killed. The third man, Joseph Rowley, clung to the skip, but was crushed against the pulley and died of his injuries soon afterwards. It appeared that the prisoner was a well-conducted man,

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who thoroughly understood his duty, and that he had performed it for seven years before without an accident.

At the close of the case for the prosecution,

Rupert Kettle, for the prisoner, objected that there was a fatal variance between the evidence and the indictment. The indictment charged the felonious negligence of the prisoner to have been whilst the said persons were so to his knowledge in the said skip and ascending in the shaft of the said pit, and that the deceased then and there being one of the said persons in the said skip, and ascending in the shaft of the said pit, as aforesaid, was then and there drawn, cast and thrown, &c. The evidence, however, was, that the negligence (if any) consisted in not causing the skip to stop after it reached the summit of the shaft and before it came in contact with the pulley. It was there that the deceased was thrown out, and therefore the negligence (if at all) and the accident occurred after the skip and the men were drawn out of the shaft, and not during the ascent of the skip in the shaft.

Spooner, who appeared for the prosecution, having been heard in support of the indictment,

Greaves, Q. C. (who was assisting the learned judges in trying prisoners), said, he thought the objection valid, but he would consult Mr. Justice Talfourd, who was then sitting in the Crown Court. Having accordingly done so, he stated that that learned judge entirely concurred in his opinion, that the variance was fatal and the prisoner must be acquitted.

A verdict of *Not Guilty* was accordingly taken, and the prisoner discharged.

OXFORD CIRCUIT.

SALOP SPRING ASSIZES.

Shrewsbury, March 21, 1851.

(Before PATTESON, J.)

REG. v. CLAY AND ANOTHER. (a)

Rape—Evidence of character for the prosecutrix.

On a trial of rape, evidence of the general character of the prosecutrix, as that she had been a reputed prostitute, is admissible.

THE prisoners, John Clay and Francis Stones, were indicted for a rape on Margaret Thompson, at the parish of Wellington, on the 27th of August, 1850.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

Kenealey, for the prisoner, having called a witness, whom he was about to examine as to the character of the prosecutrix,

Phillimore, for the prosecution, objected to the reception of evidence of that kind.

Kenealey submitted that he was at liberty to give general evidence of the character of the prosecutrix, but not particular acts, and referred to *R. v. Hodgson* (Russell & Ryan, 211.)

PATTESON, J., at first seemed to think the evidence was inadmissible, but, on referring to the authorities, said,—in *Reg. v. Barker* (3 C. & P. 589), which was a trial for rape, the question was allowed to be put, as to whether the prosecutrix had walked the streets of Oxford at a period subsequent to the alleged rape. I cannot understand why that should be. I should have thought the question would more properly refer to the conduct of the prosecutrix before the act she complained of. However, upon the authority of that and two or three other cases, very like the present, (b) I will allow the general evidence to be given.

John Thomas, a police constable, of the borough of Shrewsbury, was then called, and he stated, that twenty years ago he saw the prosecutrix on the streets of Shrewsbury as a reputed prostitute. On cross-examination, he said, he was not then a constable, and it was no part of his duty to take notice of persons of that description; that he had never addressed the prosecutrix as a prostitute, and that she was living at the time he referred to with a plasterer in Shrewsbury, but subsequently removed from the town.

The prisoners were acquitted.

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Rape—
Evidence.

(b) *R. v. Clarke*, 2 Stark. 243; *R. v. Martin*, 6 C. & P. 562.—[J.E.D.]

OXFORD CIRCUIT.

SALOP SPRING ASSIZES, 1851.

March 21.

(Before PATTESON, J.)

REG. v. PORTER. (a)

Intent to maim, &c.—Statute 7 Will. 4 & 1 Vict. c. 85, s. 4.

Quære, whether an indictment under the statute 7 Will. 4 & 1 Vict. c. 85, s. 4, charging the prisoner with shooting at J. C., with intent to maim the said J. C., is supported by evidence that the prisoner fired a gun in the direction of a light which he supposed was placed, or held, by some person, but having no intent to maim J. C., who was wounded, or any knowledge that he was there.

THE prisoner, Thomas Porter, was indicted for shooting at one John Crutchley, on the 5th day of November, 1850, with intent to maim the said John Crutchley. There were other counts in the indictment, alleging the intent to be to disable and to do grievous bodily harm.

Scotland for the prosecution.

Huddleston for the prisoner.

In this case it appeared, that the prisoner had, at various times, been annoyed and disturbed in his house at night by idle persons attempting to frighten him. On the night of the day in question, the prosecutor was returning home, and passed near the prisoner's house, with a lantern. The prisoner was at his bedroom window, and, seeing the light, thought that his nightly visitors had again appeared. He reached his loaded gun, prepared for the intruders, and immediately fired in the direction of the light, wounding the prosecutor in the face, and producing a serious injury to his right eye. The prisoner, as soon as he found the mistake he had made, and the injury he had done, expressed his sorrow.

During the examination of the prosecutor,

PATTESON, J., said, he had read the depositions carefully, and suggested that it was impossible to resist a conviction for an assault, and that, on the other hand, the circumstances of the case would hardly bear out the more serious charges in the indictment, and a slight punishment would answer the ends of justice.

Huddleston said that, after this intimation from his lordship, he would not resist a verdict of guilty of a common assault. He was prepared to contend that the intent, alleged in the indictment,

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

could not be sustained in law, for, in this case, it was clear there was no intention in the mind of the prisoner to maim or injure John Crutchley. He submitted that, under the statute 7 Will. 4 & 1 Vict. c. 85, s. 4, (b) it was necessary to prove an intent to maim the particular individual who sustained the injury, or, at least, that the intent, being so charged in this indictment, must be proved.

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v.
PORTER.
1850.

*Wounding with
intent to maim—
7 Will. 4 & 1
Vict. c. 85, s. 4.*

PATTESON, J., adverted to the case of *Reg. v. Turner* (2 Moo. & Robinson, 213), and said, "In that case it was held that an indictment for causing poison to be taken by A.B., with intent to murder A.B., is not sustained by evidence showing that the poison, although taken by A.B., was intended for another person, but that, under the statute 7 Will. 4 & 1 Vict. c. 85, (c) the indictment might have charged the intent to commit murder generally. I had held the contrary, on one occasion. I do not say what my opinion now is, as it becomes unnecessary."

A verdict of not guilty as to the felony, and guilty of an assault, was taken, and the prisoner was sentenced to two months' imprisonment.

(b) That section enacts, "That whosoever unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall stab, cut or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure or disable *such person*, or to do some other grievous bodily harm to *such person*, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

(c) That statute repeals the 9 Geo. 4, c. 31, as far as relates to attempts to murder, and enacts (sect. 2), "That whosoever shall administer to, or cause to be taken by any person, any poison or other destructive thing, or shall stab, cut or wound any person, or shall, by any means whatsoever, cause to any person any bodily injury dangerous to life, *with intent*, in any of the cases aforesaid, to *commit murder*, shall be guilty of felony, and, being convicted thereof, shall suffer death." Section 3, enacts, "That whosoever shall attempt to administer to any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate or strangle any person, with intent, in any of the cases aforesaid, to commit the crime of murder, shall, although no bodily injury shall be effected, be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

[The question raised in this case has never been expressly decided, but it certainly appears that the facts stated would have, in law, supported the charge in the indictment, namely, the firing at Crutchley with intent to maim him, &c.]

It is to be observed, that there is a distinction in the language of the present statutes, between attempts to murder and intents to maim, or do grievous bodily harm. The 2nd section of the 7 Will. 4 & 1 Vict. c. 85 (*supra*, note (c)), provides for the offence of administering poison to, or stabbing, &c. any person, with intent to commit murder. In like manner, sect. 3 provides for the offence of attempting to administer poison, attempting to drown, &c. with intent to commit the crime of murder. The 4th section (*supra*, note (b)), on the other hand, provides for the offence of shooting at any person, &c., and stabbing, cutting or wounding any person with intent to maim, disfigure, or disable *such person*, or to do some other grievous bodily harm to *such person*, &c. The 4th section, therefore, corresponds in its language to the repealed sections (ss. 11 and 12) of the 9 Geo. 4, s. 31, which used the term intent to murder, &c. *such person*.

"It seems, probable," says Mr. Greaves, in a note on this subject, in his edition of Russell on Crimes (vol. 1, p. 742, note (r)), "that the intention of the Legislature in providing by the 43 Geo. 3, c. 58, and the 9 Geo. 4, c. 31, for attempts to commit murder, was to punish every attempt where, in case death had ensued, the crime would have amounted to murder; and the

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proviso in those statutes, that if the acts were committed under such circumstances that if death had ensued it would not have amounted to the crime of murder, the prisoner should be acquitted, tends to show that the Legislature so intended. The tendency of the cases, however, seems to be that an actual intent to murder the particular individual injured must have been shown under those statutes, and also under the 1 Vict. c. 85, where the intent is so laid. Where a mistake of one person for another occurs, the cases of cutting, &c. may, perhaps, admit of a different consideration from the cases of poisoning. In the case of shooting at one person under the supposition that he is another, although there be a mistake, the prisoner must intend to murder that individual at whom he shoots; it is true, he may be mistaken in fact as to the person, and that it may be owing to such mistake that he shoots at such person, but still he shoots with intent to kill that person. So in the case of cutting; a man may cut another under the mistake that he is another person, but still he must intend to murder the man whose throat he cuts. In *Reg. v. Misters* (Salop Spr. Ass., 1841, cor. Garney, J. B.), the only count charging an intent to murder, was the first, and which alleged the intent to be to murder Mackreth; and although, on the evidence, it was perfectly clear that Misters mistook Mackreth for Ludlow, whom he had followed several days before, yet he was convicted and executed, and, I believe the point was never noticed at all. The case of poisoning one person by mistake for another seems different, if the poison be taken in the absence of the prisoner; for in such case he can have no actual intent to injure that person. These difficulties, however seem to be obviated by the 1 Vict. c. 85, which, instead of using the words, "with intent to murder such person," has the words "with intent to commit murder." It may, perhaps, be doubted, whether this alteration was not intended to enable the prosecutor to charge a shooting at one person with intent to murder another person; and doubts may perhaps be entertained, notwithstanding the very great weight due to any opinion of the very learned Barons, who considered the point in *Reg. v. Ryan*, whether a count, stating a shooting with intent to commit murder, would not be bad on demurrer, in arrest of judgment, and an error, for not stating the person intended to be murdered. It is true that it would follow the words of the act; but in many cases that is not sufficient; thus, in *Reg. v. Martin* (8 Adol. & El. 481; 3 Nev. & P. 472), it was held, that an indictment for obtaining goods by false pretences was bad on error, on the ground that it did not state that the goods obtained were the property of any person. In all cases of doubt as to the intention, it would be prudent to insert one count for shooting at A. with intent to murder him; another "with intent to commit murder," and a third, for shooting at A. with intent to murder the person really intended to be killed; and if the party, intended to be killed, were unknown, a count for shooting at A. with intent to murder a person to the jurors unknown."

The observation that, in the case of shooting at one person under the supposition that he is another, although there be a mistake, the prisoner must shoot at the individual with intent to do him, whoever he may be, the same injury, appears to be well founded, and applies to the case in question.—J.E.D.]

CENTRAL CRIMINAL COURT.

AUGUST SESSION, 1850.

August 27.

(Before the COMMON SERJEANT.)

REG. v. HARRIS. (a)

Larceny—Feloniously receiving—Workman.

A. was employed by B. to manufacture skins into furs at his (A.'s) own house; he was paid by the piece, and received his earnings weekly at B.'s warehouse, with the other servants. He worked in the same way for other persons besides B. Being intrusted by B. with skins to be made up in the usual manner, he shortly afterwards pledged them with C., who well knew that they belonged to B., and who converted them to his own use.

Held, that there was no larceny of the skins by A. and that therefore C. could not be convicted of feloniously receiving them.

THE prisoner was indicted for feloniously receiving certain skins, knowing them to have been stolen.

It appeared that a person named Turner was in the service of the prosecutor, and was in the habit of receiving skins at his master's warehouse and taking them to his own house to manufacture. He was paid by the piece and received his earnings weekly with other servants at the establishment. He was also in the habit of working in the same way for other persons. On a certain day he received skins from the prosecutor to be manufactured in ordinary course and then to be returned to the warehouse. Turner was called as a witness for the prosecution, and stated that he was met by the prisoner while taking home the skins, who asked him for the 10s. he owed him. Turner said he had no money, but he had some skins belonging to Mr. Hatch (the prosecutor), and if the prisoner liked he might have some of them. The prisoner then took twenty skins, and it appeared from his own admission that he afterwards disposed of them. Other transactions of the same kind between the prisoner and Turner were deposed to by the latter.

Huddleston and Robinson (for the prisoner), submitted that there was no evidence of a larcenous taking by Turner, and therefore that the prisoner must be acquitted. Turner was not such a

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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servant as would render his possession of property away from the premises of the prosecutor, the possession of the latter. In the *Silk Throwster's case* (2 East P. C. 682), it was laid down that if a weaver or silk throwster delivered silk or yarn to be wrought up by his journeyman in his house, and the journeyman converted it it was larceny, but if the material was to be wrought out of the house, it was not larceny, for in that case journeymen were considered as bailees. Here it appeared that Turner worked out of the house, that he was paid by the piece for what he did instead of receiving wages, and that he worked in the same way for other people besides the prosecutor. He was therefore an independent workman, making up materials for customers who employed him, just as a tailor would make up cloth into clothes for those who preferred buying their own material. If the material, under such circumstances, were converted, it would be a breach of trust, but no larceny.

Purry (for the prosecution) submitted that it would be a question for the jury whether, when these skins were obtained from the premises of the prosecutor, there was not an intention on the part of Turner to convert them. If there was, then it would be quite immaterial whether he was a servant or not. But he was a servant as far as this particular transaction was concerned; payment by the piece instead of by wages was immaterial. In *Hartley's case* (Russ. & Ry. 139), the receiving remuneration in the shape of a commission on sales did not prevent the prisoner from being regarded as a servant. Nor was he less a servant to any one person who employed him because he worked for several others: (*R. v. Batty*, 2 Moo. Cr. Ca. 257.) If then he was a servant, it was immaterial whether or not the property when converted was on the premises of the master, since the possession of the servant was the possession of the master.

THE COMMON SERJEANT, having consulted Baron Platt, held that the conversion of the property by Turner under the circumstances did not amount to larceny.

Verdict—Not Guilty.

Parry for the prosecution.

Huddleston and *Robinson* for the defence.

CENTRAL CRIMINAL COURT.

OCTOBER SESSION, 1850.

October 22.

(Before ERLE, J.)

REG. v. MC DONNELL. (a)

Threatening to accuse of infamous crime—Evidence—Intent.

On the trial of an indictment for threatening to accuse the prosecutor of an infamous crime with intent to extort money, it was proved that the prisoner had gone up to the prosecutor and said to him, "If you do not give me a sovereign I will charge you with an indecent assault." Held, that inasmuch as, if the jury believed that such language had been used by the prisoner, the intent was manifest, evidence for the prosecution tending to show that the prisoner had made a similar charge two years before ought not to be admitted.

THE prisoner was indicted for feloniously threatening to accuse the prosecutor of an infamous crime, with intent to extort money from him.

The prosecutor stated that he had gone into an urinal for the purpose of easing himself, when the prisoner came from an adjoining partition and said to him, "If you do not give me a sovereign I will charge you with an indecent assault."

Parry (for the prosecution) then proposed to call a witness who would prove that two years before the prisoner had made a similar charge against another person, and when taken into custody he gave a false address. Whenever the question was as to the intent with which an act was done, it was also permissible to give in evidence other evidence of similar conduct. In *Reg. v. Cooper* (3 Cox Crim. Cas. 547), Mr. Justice Cresswell allowed evidence of other transactions to be given.

ERLE, J.—I do not think that decision applicable to the present case. There the main question turned upon the intent with which the act was done, and evidence was adduced with respect to other transactions, to throw light upon that subject. But in this case, if the prosecutor is believed, the intent is quite manifest, and therefore it is unnecessary to call other witnesses for the purpose of confirming it. I do not think I ought to allow the evidence to be given.

The evidence was accordingly rejected.

Parry for the prosecution.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

CENTRAL CRIMINAL COURT.

OCTOBER SESSION, 1850.

October 22.

(Before the RECORDER.)

REG. v. WEBB. (a)

Larceny—Obtaining goods from servant by false pretence.

On the trial of an indictment for larceny it appeared that the prisoner having given the prosecutor an order for certain goods, they were sent by a servant with directions not to part with them without the money.

On the way the servant was met by the prisoner, who said the goods were for him, and took them, giving two counterfeit half-crowns in payment.

Held, that he was properly indicted for larceny.

Held also, that he might be convicted of the larceny notwithstanding he had been previously arraigned on and pleaded guilty to a charge of knowingly uttering the two counterfeit half-crowns.

THE prisoner was indicted for stealing a pair of boots.

It appeared in evidence that the prisoner having given the prosecutor an order for the boots, they were sent by a servant with directions not to part with them until he had received payment. On his way he met the prisoner, who said the boots were for him, and having given the servant two counterfeit half-crowns in payment, he took the boots away.

The prisoner had been also arraigned on a charge of uttering the two half-crowns, knowing them to be counterfeit, and to that charge he had pleaded guilty.

Robinson (for the prisoner) contended that upon this evidence the charge of larceny was not made out. The indictment should have been for obtaining money under false pretences. The possession of the servant was that of the master, and when he gave up the goods it was the same as if the master had done so. Then he had been already indicted and had pleaded guilty to the fact on which the present charge was based. *Autre fois convict* could not of course be pleaded, because the indictment was not specifically the same, but the transaction was a single one, and but one act of fraud was perpetrated. The maxim that no man ought to be twice vexed for the same offence would apply, and if there was no other mode

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

of carrying out the principle, the jury should be directed to return a verdict of not guilty.

Cooper (for the prosecution) submitted that the prisoner was now on his trial for a totally different offence from that to which he had pleaded guilty. Not only were the offences different but the acts charged were several and distinct in fact. The counterfeit coin was uttered, and after that the goods were obtained. The obtaining goods was no element in the former charge.

Secondly, this was a larceny and not the obtaining goods under false pretences. The distinction rested upon the fact that the servant received orders from his master not to part with the goods until he had received payment. *Reg. v. Small* (8 C. & P. 46), was very similar to this case, and there that principle was laid down; *R. v. Stewart* (1 Cox Crim. Cas. 174), was also in point.

Robinson (in reply) quoted *R. v. Parkes* (2 East P. C. 671; 2 Leach, 614); there, there was a trick resorted to for the purpose of securing the delivery of goods to the prisoner, and there was a pretended payment to the servant, but the judges were of opinion that the goods having been parted with upon receipt of what was accepted as payment by the servant, the charge of larceny could not be sustained. As to the charges being different, the uttering counterfeit coin would be no offence, unless it were done for a fraudulent purpose, that purpose here was the obtaining the goods, which was therefore the one main ingredient in both charges.

THE RECORDER.—In *R. v. Parkes* there appears to have been no direction to the servant not to part with the goods without the money; but *R. v. Small* seems to be expressly in point, and I shall direct the jury as they were directed there, that if they think this was a preconcerted scheme fraudulently to get possession of the boots, and that the servant had but the limited authority which the master swears he gave him, then the prisoner may be convicted of the larceny. I cannot see how the previous judgment against the prisoner for uttering counterfeit coin can affect this case. The offences are distinct, and if he has committed both there is nothing to prevent his being convicted of both.

Verdict—Guilty.

Cooper for the prosecution.

Robinson for the prisoner.

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CENTRAL CRIMINAL COURT.

OCTOBER SESSION, 1850.

October 23.

(Before the RECORDER.)

REG. v. JONES AND STONE. (a)

Larceny—Constructive possession.

On the trial of an indictment for stealing a sovereign, it was proved that the two prisoners went into the shop of the prosecutor, and having purchased some goods, laid a sovereign on the counter, and asked for the change. The prosecutor turned round to reach his cash box, procured the change, and laid it down upon the counter, when he found that the sovereign was gone.

Held, that he had had such a constructive possession of the sovereign, as would render the prisoners liable to be convicted of larceny if they took up the sovereign with the intention fraudulently to deprive him of it.

THE prisoners were indicted for stealing a sovereign. It appeared in evidence, that they went into the shop of the prosecutor, and, having purchased some trifling articles, they laid a sovereign down upon the counter, and asked for change. The prosecutor turned round to his cash box, procured the change, and put it on the counter, when he found the sovereign was gone. He immediately charged the prisoners with having taken it up, but they denied it, and said they saw him take it when he turned to get change. Subsequently, one of them stooped down, and immediately afterwards produced the sovereign, which she said she had found upon the ground.

Parry (for the prisoners) contended that there was no evidence to support a charge of larceny. The sovereign was never in the possession of the prosecutor. Although laid down on the counter, it was never touched by him, and might at any time have been resumed by the prisoners without his having any claim upon it.

Huddleston (for the prosecution) contended that the sovereign became constructively in the possession of the prosecutor the moment it was laid upon the counter with the view to its being changed. The goods were purchased, the sovereign was given in payment, and the prisoners had no claim to anything except the change.

THE RECORDER.—My opinion is, that this is entirely a question

(a) Reported by B. C. ROBINSON, Esq., Barrister at-Law.

for the jury. If they believe that the prisoners put down the sovereign upon the counter with the intention of fraudulently appropriating it as soon as the prosecutor's back was turned, I think they are guilty of larceny. When they parted with the money, and asked for change, they certainly must have intended to divest themselves of the property. The prosecutor, by getting the change, showed that he acquiesced in their proposal, and although he never touched the money, I am of opinion that constructively it was his.

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Verdict—Guilty.

Huddleston, for the prosecution.
Parry, for the defence.

COURT OF QUEEN'S BENCH.

November 22, 1850; January 18, 1851.

REG. v. COTTLE AND ANOTHER.

Turnpike Acts—"Town"—Construction of statute.

Under a Turnpike Act prohibiting the erection of a toll-house in any "town," the word "town" is rightly defined as an inhabited place where the dwelling-houses are contiguous, not necessarily touching each other, but so reasonably near that the inhabitants may be said to be living together.

A local act of Parliament, which was to remain in force for thirty-one years, prohibited turnpike trustees from "continuing or erecting any turnpike or toll-gate across the roads in the towns of T. and W., or in any other town through or into which the said roads might pass or be made."

Held, that these words were not to be limited to the "towns," as they were at the passing of the act, but that it was unlawful for the trustees to erect a toll-house in any part of the road which, by the increase of buildings, had become part of the town of T. since the passing of the act.

THIS was an indictment against two of the trustees of the Taunton roads, for obstructing a highway by the erection of a toll-house in the town of Taunton. The defendants pleaded "not guilty," and the question was, whether, under the powers given to them by stat. 3 & 4 Vict. c. xxxvi. (*An Act for more effectually Repairing several Roads leading from the Town of Taunton, &c.*), the defendants were justified in erecting the toll-house at the part of the road at which they had erected it. By sect. 27 of the

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statute it is enacted, "that it shall not be lawful for the said trustees to continue or erect any turnpike or toll-gate across the said roads in the towns of Taunton and Wellington, or in any other town through or into which the said roads may pass or be made; nor to apply, extend, or appropriate any of the tolls hereby granted, or any of the moneys raised by virtue of the said recited acts, &c., or to be raised, &c., in repairing or amending any part of the said turnpike-roads in any town or place which is or shall be paved or repaired by any commissioners or trustees for executing any local act of Parliament." It was admitted that at the time of the passing of the act (1840), the spot at which the toll-house had been erected was not in the town of Taunton, but since that time there had been a large number of houses built in the outskirts of the old town, by reason of which, it was contended for the prosecution, that the spot in question was, at the time of the erection of the toll-house, within the "town" of Taunton, according to the meaning of that word in sect. 27 of the statute.

The indictment was tried before Mr. Gurney, Q. C., at the Lent Assizes, 1850, for the county of Somerset. The jury had had a view of the spot, and the question was left to them whether it was within the "town" of Taunton. The learned judge directed them, that by the word "town" must be understood an inhabited place where the dwellings are contiguous, so that the occupants may be taken to be living together; that it was not necessary that the houses should touch each other; that it was sufficient if they were so reasonably near that the inhabitants might be said to dwell together. A verdict was found for the Crown, but leave reserved to the defendants to move to enter the verdict for themselves, if the prohibition in sect. 27 ought to be limited to roads which were in the town of Taunton at the time of the passing of the statute. In the ensuing term a rule *nisi* was obtained accordingly to enter the verdict for the defendants; or for a new trial upon the grounds of misdirection, and that the verdict was against the evidence.

The misdirection complained of was, that the learned judge did not sufficiently make it a part of the definition of the word "town," that there must be a continuous mass of buildings, and a continuous occupation. *Elliott v. The South Devon Railway Company* (2 Exch. 725), was cited and commented on, but

LORD CAMPBELL, C. J., said,—Substantially the matter was left to the jury in the very way in which it is contended that it ought to have been left. There was certainly no misdirection.

Crowder, Butt, and Fitzherbert, showed cause.—The verdict ought to stand for the Crown. The words in sect. 27 show that the future as well as the present state of things was contemplated. The trustees are forbidden to "continue" or "to erect," and that not only in the towns of Taunton and Wellington, but in any other town through or into which the said roads may pass or be made, there being at the time when the act passed no other town through or into which the road in question passed, but the possibility of

the formation of some new town being anticipated by the Legislature. The last words of the section speak of "any place which is or *shall* be paved" by local commissioners. The same rule of good policy is applicable to both present and future. The object of the statute was to provide for the varying wants of the inhabitants. If the place were actually to cease to be town in one direction by the removal of houses, &c., there a toll-house might be erected; but if it grow extensively like a large manufacturing district in another, there an existing toll-house must not be continued. By sect. 32, the act is to continue in force for thirty-one years, a period in which most extensive changes of occupation may take place: (*Hammond v. Brewer*, 1 Burr. 376; *Reg. v. Fisher*, 8 C. & P. 614.)

Kinglake, Serjt., *Moody*, and *M. Smith*, in support of the rule.—The word "town" must be taken to be used in the same sense throughout the act. In sect. 14, it is recited, that there are several turnpike or toll-houses belonging to the said turnpike-roads, in and near the town of Taunton, which it may be convenient to discontinue as toll or collecting-houses. There the word "town" must be limited to that which was the town of Taunton at the time of the passing of the act. The same section gives power to sell the then existing toll-houses, but no power to dispose of any thereafter to be erected, which surely would have been given, if any thereafter to be erected could become unlawful by reason of the town being extended to them. The benefits and grievances as they existed at the time of the passing of the statute were before the eyes of the framers, and they were legislating for a state of things which they could see and know, not for matters of which they could then know nothing. If a growing town had been in their contemplation, words plainly future would have been used, and they would not have confined the operation of the act to a period of thirty-one years, within which no very violent changes were likely to happen. The words in sect. 27, "any other town," may apply to Minehead, or Milverton, or other towns which are mentioned in sect. 2 of the act, for there are other roads regulated by the act which do extend to other than existing towns. The act provides powers for borrowing money and for mortgaging the tolls: it would be unjust to the lenders to require them, in looking at their security, to consider any other state of things than that which existed when the act was passed. [They cited many of the former local acts of the town of Taunton, but as these are either repealed or relate to different matters, they really throw no light on the question.]

Cur. adv. vult.

January 18.

LORD CAMPBELL, C. J. delivered the judgment of the court:—In this case, having expressed our approbation of the direction of the learned judge to the jury respecting what ought to be considered the limit of the town within the meaning of the act of

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Parliament on which the indictment is founded, we took time to consider the point upon which leave was reserved to enter the verdict for the defendant, namely, whether the prohibition to continue any turnpike-gate across roads in the town of Taunton applies to the town as it was on the 19th of May, 1840, when the act passed, or as it might be at any time during the thirty-one years for which the act was to be in force. We have come to the conclusion that the latter is the just construction. Whatever inconvenience might arise from authorizing the erection of a turnpike-gate in a place which, when the act passed, had been in the country, and before the act expired had become nearly in the centre of a great town; if there had been a clear enactment to that effect we must have been bound by it. But looking to the language here employed, we think the Legislature contemplated the probable increase of Taunton within a period longer than that generally assigned for a generation of the human race, and intended that its inhabitants as it increased should be exempt from the annoyance of a turnpike-gate cutting off the free intercourse between neighbours in the same street. The words are—"It shall not be lawful for the said trustees to continue or erect any turnpike-gate across the said roads in the towns of Taunton and Wellington, or in any other town through or into which the said roads may pass or be made." The whole structure of the clause is prospective. What is to be town must be the same as to the continuing as to the erecting of the gate; and if a new gate is to be erected in the year 1870, the trustees are surely directed to consider whether the road is *then* within the limits of the town of Taunton, not whether it was thirty years before. This construction is fortified by the reference to "any other town through or into which the said roads may pass," meant, probably, to protect the inhabitants of any new town which might spring up within the district while the act should be in force. We are therefore of opinion that the learned judge was bound to leave the question to the jury whether, when the indictment was found, the gate stood across a road which was to be considered at that time in the town of Taunton. We have likewise to dispose of the application for a new trial, on the ground that the verdict in the affirmative was contrary to the evidence. Had the verdict been the other way, we should have by no means disapproved of it; but considering that, after the unexceptionable direction of the learned judge, it turned on a pure question of fact, to be decided by twelve gentlemen who had had a view of the locality, and that they may have come to the proper conclusion, we think the verdict ought not to be disturbed, and the rule for a new trial must be discharged.

Rule discharged.

Ireland.

CROWN COURT, COUNTY DOWN.

REG. v. ANDREW FOGARTY. (a)

*Practice—Assignment of counsel and attorney to a prisoner.**The court may properly request counsel to give his honorary services to a prisoner.**Aliter, with an attorney.**But the court will recommend that, in such cases, the crown shall pay the fees both of counsel and attorney as assigned.*

IN this case the prisoner was charged with the murder of his wife, Margery Fogarty, by administering to her a dose of arsenic, at Kilkeel, on the 26th July, 1850.

PIGOTT, C. B., after conferring with the Crown Solicitor, addressed Mr. Macmeehan, and requested that he would undertake the defence of the prisoner, who was unable to employ attorney or counsel.

Macmeehan replied that he had no objection personally to act, but there was a feeling and opinion existing on the subject among the bar which compelled him to beg that his lordship would excuse him for declining.

After some conference among the members of the bar,

Sir *Thomas Staples*, Q.C., rose and addressed the court.—He said that on the part of the bar he thought it right to state that there was a feeling among them in which he quite concurred, that no counsel could, with propriety, undertake the defence of a prisoner without receiving instructions from an attorney. He also had to say, not on the part of Mr. Macmeehan, but on the part of the bar, that in every case in which counsel was assigned, the Crown should pay him a fee; up to a very recent period it was a rule to do so.

PIGOTT, C.B., said he could make no rule upon the subject of payment of counsels' fee in such cases; but he would certainly recommend that it should be paid by the Crown, and it was his own opinion that the fee ought to be paid. With respect to the assignment of counsel and attorney for a prisoner, it was his opinion that a judge might with propriety call on a barrister to give his honorary services to a prisoner who was unable to employ

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

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one; but he thought the case different as regarded an attorney. A case occurred at the Special Commission in Clonmel, before himself and the Lord Chief Justice (*Reg. v. Cody*), in which an attorney had been paid for certain services, and refused to act further without receiving further remuneration; the Chief Justice and himself were of opinion that they had no power to compel him to do so, but they called upon Mr. Roleston to defend the prisoners, and he consented to do so without the assistance of an attorney; and, after as able a defence as ever he (the Chief Baron) had heard in a court of justice, the prisoners were convicted.

Macmeehan said he entertained a great respect for Mr. Roleston, but he dissented from the propriety of the course taken by him. Perrin, J. had expressed a decided opinion that counsel ought not to act without an attorney.

PIGOTT, C.B., said he could not compel counsel to act; he could do no more than appeal to the sense of feeling of the bar.

Murphy (solicitor) having consented to act as attorney for the prisoner, *Macmeehan* consented to act as counsel.

COURT OF QUEEN'S BENCH.

February 7, 1851.

(Before LORD CAMPBELL, C.J.)

REG. v. HEWITT AND OTHERS. (a)

Conspiracy—Combination—Workmen.

The Philanthropic Society of Coopers was formed in order to relieve its members when sick, and to provide for their funerals. One of their members was fined by them for working in a yard where steam machinery was used, and upon non-payment of the fine they acted in such a way as to prevent him from obtaining work:

Held, an illegal combination and conspiracy.

THIS was an indictment for a combination by workmen, contrary to 6 Geo. 4, c. 129, and for a conspiracy.

It appeared that all the defendants were members of a club or society, called "The Philanthropic Society of Coopers." It was a benefit society. Hewitt was the president, and Jack was the secretary. The society had an acting member in every cooper's

(a) Reported by J. W. METCALFE, Esq., Barrister-at-Law.

yard. A man named Charles Evans was a member of the society. He was working in Mr. Turner's yard, but, with the permission of Mr. Turner, he did four days' work at the steam mills of Messrs. Rosenberg and Montgomery, where steam machinery was extensively employed for making casks. When this came to the knowledge of the committee of the society, they inflicted a fine of 10*l* payable by instalments, upon Evans, for working in a yard where steam machinery was employed. Evans refused to pay, and the other men in Mr. Turner's yard then left their work and refused to return while Evans was employed. Evans was, in consequence, thrown out of work. Each man who left Turner's yard on account of Evans was paid 9*s*. for his loss of time, by the committee. The fine was imposed in accordance with the rules of the society.

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Wilkins, Serjt., in addressing the jury for the defendants, contended that the defendants were members of a society which they believed to be for their benefit. They made certain rules and imposed fines for the breach of them. The offence charged was conspiring to do an unlawful act, but it was not an unlawful act to impose a fine upon a member of the society for breach of one of the rules of the society, unless the rules were unlawful in themselves, or were made for an unlawful purpose. The object of the defendants was to teach Evans that he had departed from his duty to the society, and that he had broken its rules. The object of the act of Parliament was to protect the masters from the combinations of the men; but here the masters did not complain, and it was, therefore, difficult to imagine that the statute had been violated.

LORD CAMPBELL, C. J. (to the jury).—It appears to me that this is one of the most important cases ever brought before a British jury, and upon its result must depend very much the prosperity of the manufacturers and the good of the operatives. But let it be clearly understood that, whatever may be the result of this case, such societies as the present are not in any way illegal. The Philanthropic Society is, according to its rules, a most lawful and a most beneficial institution; the object of it is to take care of its members when sick, and to provide a decent funeral for them when they are called away; but it cannot be permitted that, under the guise of such laudable objects, the members shall enter into a combination or conspiracy to injure others. By law every man's labour is his own property, and he may make what bargain he pleases for his own employment; not only so—masters or men may associate together; but they must not, by their association, violate the law; they must not injure their neighbour; they must not do that which may prejudice another man. The men may take care not to enter into engagements of which they do not approve, but they must not prevent another from doing so. If this were permitted, not only would the manufacturers of the land be injured, but it would lead to the most melancholy consequences to the working classes. No doubt the

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defendants may have been under a delusion that they were doing what they were entitled to do, but they must be instructed that the law must be obeyed, and that they cannot be permitted to injure their neighbours in carrying out that which they may consider to be a protection to themselves. It has been stated by the witnesses, that a fine follows a man all over London and all over England. This shows the power of the society. Let them have their rules, and let them act under them; but if they are to fine for some nondescript offence, and that fine is to follow a man all over England,—if the man is always to go about with that brand upon him, it becomes the more important that judges and juries should see that such societies do not infringe the law. The payment to the men of the 9s. each for their loss of time was taken from the funds of the society, and was a clear perversion of its objects.

Verdict—Guilty.

LORD CAMPBELL, C. J.—This is a case in which it is right to pass judgment at once. The offence is a most serious one, and, if allowed to pass with impunity, would bring ruin upon the trade and manufactures of this country, and would involve in its ruin the workmen, upon whom the prosperity of this country mainly depends. It clearly appears that this charitable institution, departing from its laudable purpose, was applied to, to prevent one of its members from exercising his free will, and employing his industry in a way which he thought most to his advantage. It is clear that the president, secretary, and committee resolved that Evans should be punished for having gone to work at the steam mills; that they unlawfully imposed on him a fine for so doing, and that they proceeded by unlawful means to induce him to pay that fine. This is an offence which the law must punish, and I hope it will be known to all these societies, that while they will be protected by the law when acting lawfully, the law will punish them when they interfere with the free will and the exercise of the industry of their members. It is an offence for which they must be severely punished.

The defendants were then sentenced to various terms of imprisonment.

The *Solicitor-General*, *E. James*, Q. C., and *Huddleston*, for the prosecution.

M. Chambers, Q. C., *Wilkins*, Serjt., and *Warren*, for the several defendants.

COURT OF QUEEN'S BENCH.

April 15, 1851.

REG. v. GARLAND.

Indictment for nuisance—Evidence.

Indictment for burning arsenic, whereby noisome and unwholesome smells did arise, so that the air was greatly corrupted. Evidence that cattle and trees in the neighbourhood were poisoned by the particles of white arsenic which fell on the ground from the noisome vapour :

Held, admissible, though the white arsenic itself was free from smell.

INDICTMENT for nuisance, charging that the defendant did burn and melt crude arsenic for the purpose of making arsenic, whereby divers noisome and unwholesome smells did thence arise, so that the air was greatly corrupted and infected *ad commune nocumentum*.

At the trial, which took place before Martin, B., at the last Cornwall assizes, it appeared that the defendant was the proprietor of an arsenic manufactory; that the vapour produced by burning metallic arsenic was offensive to the smell; and that particles of the white arsenic were carried off in the vapour, and deposited on the adjoining lands. The effect was to poison the cattle and the trees, and evidence was offered and received, after objection made, that several of the cattle of the prosecutor, which had been turned upon the adjoining pasture, had actually died.

A verdict was found for the Crown.

Crowder now moved for a new trial, on the ground that the evidence of injury to the prosecutor's cattle and trees was inadmissible, because irrelevant. That injury proceeded from the deposited particles of white arsenic, and had no tendency to prove that the air was corrupted by unwholesome smells, which was the only charge in the indictment.

LORD CAMPBELL, C. J.—Even giving to the indictment the limited construction contended for, it is impossible to say that evidence of the particular effect in the death of the cattle and the trees was not admissible for the purpose of showing what was the quality of the vapours which emitted the offensive odours proved by the witnesses.

PATTESON, WIGHTMAN, and ERLE, JJ., concurred.

Rule refused.

COURT OF QUEEN'S BENCH.

April 27, 1851.

REG. v. HENRY THOMPSON AND OTHERS.

*Indictment—Limitation of time—Repeal of statute—Conspiracy—
Repugnant verdict.*

The defendants were indicted for conspiring to procure the removal of certain foreign goods from bonded warehouses, without payment of the duties due upon removal. The Customs Acts in force at the time assigned to the conspiracy were stats. 3 & 4 Will. 4, cc. 51–61, which were repealed (except as to duties payable under them) by stat. 8 & 9 Vict. c. 84. The indictment was not preferred until after the passing of the later statute :

Held, that neither the limitation clause in stat. 3 & 4 Will. 4, c. 53, s. 120 (which was in the same language as stat. 8 & 9 Vict. c. 87, s. 134), nor the repeal of the acts themselves, was any answer to the indictment.

An indictment for conspiracy charged "that A., B., and C. did conspire together, and with divers other persons to the jurors unknown," &c. No evidence was offered affecting any other persons than A., B., and C. The jury found A. guilty, but acquitted B. and C., being of opinion that either B. or C. was guilty, but not being able to determine which of the two :

Held, by Lord Campbell, C.J., Patteson and Coleridge, JJ.: dissentiente, Erle, J., that the verdict was inconsistent, and that A. was entitled to an acquittal.

THIS was an indictment against Henry Thompson, Samuel Tillotson, and Samuel Henry Maddox, found at the Lancashire Assizes, but removed into this court by a *certiorari*, which charged that the defendants "unlawfully and fraudulently did combine, conspire, confederate and agree together, and with divers other persons to the jurors unknown," to cause and procure certain foreign goods, which had been theretofore imported, and which were deposited in certain approved vaults, and upon the removal of which certain duties would be due and of right payable to our Lady the Queen, clandestinely and illegally to be removed from the vaults where the same were deposited, without the payment of the duties, &c., with intent to cheat and defraud our Sovereign Lady the Queen of divers large sums of money, &c. &c. There were various counts in the indictment setting out different overt acts, and there were also counts charging, generally, a conspiracy to defraud the Queen of duties payable, without setting out any overt acts. The date assigned to the conspiracy in each count

was May 13, 1841, and the evidence was confined to transactions happening between the years 1839 and 1842. At the trial before Cresswell, J., at Liverpool, at the Summer Assizes, 1850, it appeared that the defendant Thompson was the occupier of certain bonding warehouses, from which it was alleged that the conspiracy contemplated the removal of certain goods without the payment of duty, and that Tillotson and Maddox were servants in the docks, called "lockers," in the keeping of one or other of whom from time to time would be a key, without the use of which the goods could not be got from the warehouses. No other person was shown to be connected with any such fraud as was charged in the indictment but the three defendants. The jury were satisfied that Thompson conspired with one or other of the two lockers, i.e. either with Tillotson or Maddox, but as they could not say with which, Tillotson and Maddox were both acquitted, and a verdict of acquittal was also claimed for Thompson, upon the ground that one man could not be guilty of conspiracy, and that the only persons with whom Thompson could have conspired were acquitted. It was also contended at the trial, that this prosecution was barred by statute 3 & 4 Will. 4, c. 53, s. 120, or that the acts of Parliament, statutes 3 & 4 Will. 4, cc. 51-61, being repealed by statute 8 & 9 Vict. c. 84, s. 1, no indictment could be sustained for a conspiracy to commit an offence against a repealed statute. The learned judge overruled all these objections, and directed a verdict to be entered for the Crown against the defendant Thompson. In the following term a rule *nisi* was obtained for a new trial, upon the ground of misdirection, against which

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The *Attorney-General*, *Knowles*, and *James* now showed cause. 1. This indictment is maintainable. Statute 3 & 4 Will. 4, c. 53, s. 120, enacts, "that all suits, indictments, or informations exhibited for any offence against this or any other act relating to the customs in any of his Majesty's Courts of Record at Westminster, or in Dublin, or in Edinburgh, or in the Royal Courts in the Channel Islands, shall and may be had, brought, sued, or exhibited within three years next after the date of the offence committed." The present indictment is for a *conspiracy*, which is not an offence against the statute, but at common law; and, further, it was exhibited before the grand jury at the assizes, and not in any of His Majesty's Courts of Record at Westminster. The word "indictments" is fully satisfied by reference to the indictments mentioned in sect. 112, as to be preferred in the name of the *Attorney-General*, and probably sect. 120 was framed with a reference to sects. 75 and 112. The Crown is not to be barred from prosecuting offenders except by express words of limitation; and if all indictments against the Customs Acts are within sect. 120, it would follow that the felonies made capital by sects. 58, 59, would also be within it, and barred by a limitation of three years. Again, the repeal of statute 3 & 4 Will. 4, c. 53, by statute 8 & 9 Vict. c. 84, s. 1, is no answer to this indictment. A conspiracy is not an offence against the act, for the conspiracy

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might fail or be detected, and so no offence against the act be committed, though the conspiracy would be complete. Besides, statute 8 & 9 Vict. c. 84, s. 1, expressly keeps alive the former acts, as to the duties due and payable, or penalties or forfeitures incurred under the former acts, and this conspiracy is in regard to the duties payable. 2. The acquittal of the other two defendants does not operate as an acquittal of Thompson. The charge in this indictment is joint and several. Thompson is charged with conspiring with the other two, and with divers persons unknown. The word "other" has either no meaning, or it means other than Thompson, or than Tillotson, or than Maddox, as applied to each respectively. When the petty jury cannot say whether Tillotson or Maddox were the co-conspirator, surely the co-conspirator is unknown. The gist of the offence is the conspiracy. The finding of the grand jury is separate as to each, and in principle their trial must be considered as the trial of each. If Tillotson and Maddox had been tried first, their acquittal or conviction could not have been made evidence against Thompson. *R. v. Kinnerley* (1 Stra. 193); *Reg. v. Herne* (cited, *ibid.* 195.) In considering the case of Thompson, the acquittal of the others ought no more to be regarded than if they had been tried separately. The finding of the petty jury is equivalent to this—"we cannot say which of the two defendants, Tillotson or Maddox, is guilty,"—it does not mean "we find that both of them are innocent." (They referred also to *Rex v. Bush*, R. & R. 272.)

Murphy, Serjt., *Cowling*, and *H. Hill* in support of the rule.—

1. All offences against the customs are creatures of the statute law, and depend entirely upon it, and therefore, the limitation cannot be got rid of by investing a statutable offence with a common law character. The words in sect. 120 are not "indictments" upon the statute, but "indictments" generally. The other words in the section, with reference to the courts at Westminster, apply only to "suits or informations." Then the repeal of the statute destroys everything of which the statute must be the basis. Not every conspiracy is indictable; but a conspiracy to do an unlawful act is undoubtedly so. The only unlawful act suggested was made unlawful by the statute, and the statute being repealed, the illegality of that act ceases, and so the indictable character of the conspiracy. 2. The acquittal of two of the defendants enures, under the circumstances, to the acquittal of all. If Thompson, Tillotson, and Maddox only had been indicted, without the mention of divers unknown persons, it would as plainly follow that the acquittal of two of a charge of conspiracy wrought the acquittal of all, as that the acquittal of one has that effect when two only are charged. The words "divers other persons" mean "other than" those mentioned before, because Thompson, Tillotson, and Maddox are persons known to the grand jury, and the "other persons" mentioned in the indictment are declared to be unknown to them. An alternative verdict, such as that Thompson conspired with Tillotson or with Maddox, would be wholly unprecedented,

and bad in law. (*Rex v. Pywell*, 1 Stark. 402, was also mentioned by them.)

LORD CAMPBELL, C. J.—I am of opinion that the first objection cannot be supported. If we look to the plain language employed by sect. 120 of the stat. 3 & 4 Will. 4, c. 53, we see that it cannot embrace indictments found at a Court of Oyer and Terminer at the assizes, but is confined to indictments found in this court at Westminster. This indictment was not so found, but was found at the assizes at Lancaster. It is suggested that the words of sect. 120 may be taken distributively, and may mean “suits or informations exhibited in any of His Majesty’s Courts of Record at Westminster,” and indictments wheresoever found. But I think a reference to sects. 75 and 112, shows that a more limited construction was intended. The argument as to the repeal of the statute cannot prevail. A conspiracy is an offence at common law, consummated as soon as it is entered into. Here, at the time of the conspiracy, the Queen was of right entitled to the duties in respect of which it was entered into. The second objection, however, seems to me to be insuperable. We must take it upon the evidence as the same thing as if the indictment had been against the three defendants, and no evidence had been offered except against them. If, then, the verdict had been against Thompson, and in favour of Tillotson and Maddox, it could not have been supported. It is allowed that if there be an indictment against two for conspiracy, and one be acquitted, the other must be acquitted likewise. I cannot distinguish that case and the present, for the jury, in point of fact, declare that the two last-named defendants did not conspire with the first, and, if so, he could not conspire with them. The only mode in which it struck me that the verdict could be supported was, as a finding, that Thompson conspired with either Tillotson or Maddox. But I am satisfied that an indictment in those terms would be contrary to law, and a verdict equally so. The expression “divers others to the jury unknown” cannot include Tillotson nor Maddox. Neither the grand jury nor the petty jury could have intended that.

PATTESON, J.—I quite agree. I hardly know to what the word “indictments,” in sect. 120, does refer, but probably it means the same as the indictment preferred by the Attorney-General, spoken of in sect. 112. At all events, sect. 120 is confined to proceedings in the Superior Courts at Westminster. Upon the other point, I am of opinion that Thompson could not, upon the evidence, have been convicted of conspiring with persons unknown, the same being other than Tillotson or Maddox. The evidence was applied only to the three persons named, and failing as to two of them it fails altogether. There would otherwise be a contradiction in the verdict, for a conspiracy implies mutual consent and agreement. The indictment would have been proved if it had charged simply that Thompson conspired with certain persons to the jurors unknown.

COLERIDGE, J.—I am of the same opinion upon both points.

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Upon the first it is sufficient to say that this charge is not within the words of sect. 120, either as to the court in which it is preferred, or the matter of the charge itself. Upon the other point, I think you must read this indictment, giving to ordinary language its ordinary meaning. It imports that each defendant conspired with the rest, and with some others who are unknown. What amount of evidence would suffice for separate trials of these persons is wholly immaterial. The jury find that neither Tillotson nor Maddox was guilty with Thompson, and there was no evidence against anybody else. Upon ordinary principles that is an acquittal of Thompson. The difficulty is, because of the reason assigned by the jury for the acquittal. But, in point of fact, they are acquitted with all the legal consequences of an acquittal, and Thompson, standing alone, cannot be convicted of conspiracy.

ERLE, J.—Upon the second point I differ with the rest of the court. It is clearly conceded that the defendant Thompson was shown to be actually guilty of the *offence* in respect of which he was indicted. Then, is that offence comprised in the terms of the indictment upon which he was tried? The language of the indictment must be tried by the rules of pleading, not by the common interpretation put upon ordinary language. There is a conventional meaning attached, for pleading purposes, to a variety of allegations of time, value, and the like, in every indictment, which is wholly different from the meaning which would belong to the same expressions in the language of ordinary life. Where an offence charged upon several is of such a nature that one may be guilty, and the others—some or all of them—not guilty, the matter must be considered as to each as if he were indicted alone. And further, with reference to each, though the same offence may be charged in an indictment in a variety of ways in various counts, and with attendant circumstances of more or less aggravation, if the offence of which the defendant is proved to be guilty be included in the matter charged, the defendant may be found guilty without the circumstances of aggravation, and in any one of the forms included in the indictment. The present indictment includes a charge of conspiracy in a variety of forms. It imputes that Thompson conspired with Tillotson; that he conspired with Maddox; that he conspired with an unknown person. If any of those alternatives be proved, the indictment is sustained as against him. The judge ought to sum up the evidence, and take the opinion of the jury upon each by itself. Did Thompson conspire to do the matters here complained of? The jury say that he did. Did he conspire with Maddox or with Tillotson? The jury answer, “we cannot say: we are sure he conspired with one of them.” Then he conspired with a person unknown. The person is as much unknown when the jury cannot pronounce upon an alternative of this kind, as when they have no idea whatever of who the second conspirator is. They may well say, in such a state of doubt between two offenders, that the actual offender is unknown to them. I think it would be a violation of the rules of

pleading to strain the words here employed to their strict meaning in an ordinary grammatical sense, and as we are occasionally compelled to defeat justice by adhering to the rules of pleading, it would be satisfactory to my mind that justice should sometimes be assisted by a similar adherence.

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Rule absolute.

COURT OF QUEEN'S BENCH.

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REG. v. DALE.

*Recognizances to keep the peace—Names of justices—Initial letters—
Sci. fa. against security.*

*A writ of sci. fa. upon a recognizance of the peace described the justices
by the initial letters of their Christian names :*

Held, upon demurrer, that the writ was good.

SCI. FA. upon a recognizance of the peace against the defendant, who was one of the bail. The writ alleged the recognizance to have been acknowledged before "Lee Townshend, Esq. and J. H. Harper, Esq.," two justices of Cheshire.

Demurrer.

Cole, in support of the demurrer.—1. The writ ought to show that the 24th and 25th rules of practice on the Crown side, made by the judges of this court pursuant to 6 Vict. c. 20 (see Coroners Crown Office Forms, p. 6), have been complied with. 2. The names of the justices are not sufficiently set out. It has been held that a single vowel may be a name, but that a consonant cannot: (*Lomax v. Landells*, 6 C. B. 577; *Miller v. Hay*, 3 Ex. 14.) [ERLE, J.—Are all legal proceedings void if a Christian name is imperfectly written? I think I have often seen, in commissions of oyer and terminer, the Christian names of the commissioners designated by initials only. These justices may be so designated in the commission of the peace.] It is not necessary to say that the recognizance is void; but, in pleading it, either the names ought to be set forth fully, or an excuse for not doing so alleged.

Aspland, contra, was not called upon.

LORD CAMPBELL, C. J.—I think that there is nothing in either point. No authority has been cited for the position that the com-

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pliance with certain rules of practice must be stated in the writ; and as to the names of the magistrates, it is said that they are described by initial letters; but I do not know that they are initials; it may be Mr. Harper's proper baptismal name. I do not think that the objections taken by special demurrer to declarations upon bills of exchange apply to a case like this; but I must say that I cannot at all acquiesce in the distinction which has been drawn between vowels and consonants. I allow that a single vowel may be a name; but why may not a consonant also? Indeed, I have just been informed by a gentleman, on whose accuracy I place the most implicit reliance, that he knows a lady who was baptized by the name of D.

PATTESON, J.—I have heard no authority for saying that a recognizance in this form would not be good.

WIGHTMAN and ERLE, JJ., concurred.

Judgment for the Crown.

COURT OF QUEEN'S BENCH.

May 7, 1851.

REG. v. THOMAS POCKOCK AND OTHERS.

Manslaughter—Trustees of road.

A coroner's inquisition alleged that the defendants were trustees of a road under an act of Parliament, and that it was their duty to contract for the reparation of that road; that they feloniously did neglect and omit to contract for the reparation thereof, whereby the same became very ruinous, miry, &c., and a cart, which the deceased was driving along the road, went into a hole, and the deceased, being thrown out, sustained injuries of which he afterwards died:

Held, bad, for not showing any such neglect of duty as could render the trustees guilty of manslaughter.

THIS was a rule to quash a coroner's inquisition which had been removed into this court by *certiorari*. The inquisition alleged that the defendants were the trustees of a public road under an act of Parliament; that it was their duty to contract for the due reparation of the said road; that they feloniously did neglect and omit to contract for the repair of the same, whereby it became very miry, ruinous, deep, broken, and in great decay;

and that a cart, which the deceased was driving along the road, fell into a hole in the road, and by reason thereof the deceased was thrown out, and sustained the injuries of which he afterwards died.

Charnock showed cause.—This case is not distinguishable from those of persons who have the charge of machinery at mines, of signals, or locomotives on railways, and the like; and there are many precedents of indictments for manslaughter in such cases where death has been occasioned by a neglect of duty on the part of the persons so intrusted: (*R. v. Barrett*, 2 Car. & K. 343; *R. v. Haines*, *ib.*, 368; *R. v. Gregory*, 5 B. & Ad. 555.) Here a public duty was cast upon the trustees, and they were authorized to raise money by rates for the purpose; and if their neglect of duty has caused the death of another, they are guilty of manslaughter.

Hayes, *contra*, was not called upon.

LORD CAMPBELL, C. J.—The cases cited show a personal duty, the neglect of which has directly caused death; and, no doubt, where that is the case, a conviction of manslaughter is right. But how do those apply to trustees of a highway? How can it be said that their omission to raise a rate, or to contract for the reparation of the road, directly causes the death? If so, the surveyors or the inhabitants of the parish would be equally guilty of manslaughter; for the law casts upon them the duty of keeping the roads in repair. To uphold this inquisition would be to extend the criminal law in a most alarming manner, for which there is no principle or precedent.

PATTESON, J.—This is really too extravagant.

WIGHTMAN, J. concurred.

ERLE, J.—In all the cases of indictment for manslaughter, where the death has been occasioned by omission to discharge a duty, it will be found that the duty was one connected with life, so that the ordinary consequence of neglecting it would be death. Such are the cases of machinery at mines, of engine-drivers, or the omission to supply food to helpless infants.

Inquisition quashed.

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Manslaughter
—*Trustees of*
Turnpike.

COURT OF QUEEN'S BENCH.

May 7, 1851.

REG. v. CHARLESWORTH. (a)

Highway—Obstruction—Limited dedication—Reservation of right to cross public road with tram-roads.

A public turnpike road, which went over the property of a large pit owner, was crossed by tram-roads leading to the pits. As pits were opened on one side of the road, tram-roads leading to and from the pits had always for many years been made across the road. They were let into a groove in the road, so that the highest part of the tram-road was on a level with the turnpike road. By the Turnpike Act, the trustees of the road had power to grant licences for these tram-roads. Upon an indictment for obstructing the road:

Held, that the tram-roads were an obstruction, and that there could not be a dedication to the public with a reservation by the owner of the soil of the power to make as many of such tram-roads as he should think right for the convenient use of his property.

INDICTMENT for obstructing a public highway, tried before Cresswell, J., at York, when a verdict was taken for the Crown, subject to a case. It appeared that the highway in question was a turnpike road, under the management of trustees appointed by a local act; that it went over the property of Lord Stourton, who was the owner of many coal-pits on the west side of the road. For the convenience of conveying the coal from those pits, tram-roads had been laid down across the turnpike road; and for many years, as often as a pit was opened, a new tram-road was laid down. The tram-roads were sunk in a groove in the road, so that the highest part of the tram-road was on a level with the turnpike road. By their act of Parliament, the trustees of the turnpike road had power to grant licences for the formation of these tram-roads across the turnpike road; but no licence had been obtained for the formation of the tram-road which was the subject of the present indictment.

Tomlinson appeared for the Crown, but the court called upon

Hardy, contra.—There was no such obstruction to the highway as amounts to an indictable nuisance. The tram-road presents no obstacle to the passage of vehicles along the road: (*R. v. Tindall*, 6 Ad. & Ell. 143; *Reg. v. Russell*, 6 B. & C. 566; *Reg. v. Ward*, 4 Ad. & Ell. 384.) 2. The evidence shows that there has

(a) See also *R. v. Betts*, 15 L. T. 182.

only been a partial and limited dedication of this road to the public. These tram-roads have always been made as often as pits have been opened; and it must be taken that, in dedicating the road to the public, he reserved a right of way for the carriage of his coals from the west side across the road; and if so, he is entitled to carry them across in the most convenient mode: (*R. v. Chorley*, 12 Q. B. Rep. 515; *Dand v. Kingscote*, 6 Mee. & W. 174; *Marquis of Stafford v. Coyney*, 7 B. C. 257. (b))

LORD CAMPBELL, C. J.—I do not think that Mr. Hardy has succeeded in showing any ground why this prosecution should not be sustained. First, he says that there is no obstruction. Now, I do not lay any stress upon the obstruction occasioned in the making of these tram-roads, because that is not charged in the indictment; but taking the description of them from the case, I cannot help saying that they must necessarily lead to some inconvenience to travellers passing along that road; and, in my opinion, they do constitute an indictable nuisance. But then it is suggested that the owner of the soil has reserved to himself a right to make as many of these tram-roads across the highway as he likes, for the convenient use and enjoyment of his own property; but no authority has been cited for the position that a dedication of a highway may be accompanied by so large a reservation as that; and I think it cannot. I hope that no inconvenience will result from our decision; because the trustees have a right to grant licenses for the purpose, whenever such license ought to be granted.

PATTESON, J.—I cannot doubt that the road must to some extent be rendered less safe for passengers upon it by these tram-roads; and as to the other point, how can there be a reservation so large as that which is suggested—a reservation of a right to cross the road, not confined to any particular places, but wherever and as often as he finds convenient for the use of his property. If the tram-road had been made by the licence of the trustees, it may be doubtful whether an indictment could be sustained; but the trustees may not only grant a licence for the tram-roads, but require their removal, and a penalty is imposed for not removing them when required.

WIGHTMAN, J., concurred.

ERLE, J.—I am only desirous of confining my judgment to this case. If, in fact, these tram-roads are no nuisance to the highway, that ought to have been found in the case.

Judgment for the Crown.

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(b) But see *R. v. Leake*, 5 B. & Ad. 469.

OXFORD CIRCUIT.

BERKSHIRE SPRING ASSIZES, 1851.

Abingdon, February 28.

(Before PATTESON, J.)

REG. v. MAY AND DARLING. (a)

Indictment—Assaulting gamekeepers—Stat. 9, Geo. 4, c. 69, ss. 2 and 9.

A count for assaulting a gamekeeper under the stat. 9. Geo. 4, c. 69, s. 2, alleged that the defendants, with other persons to the number of three and more, entered by night a certain close, with guns and other offensive weapons, for the purpose of taking and destroying game, and then proceeded to allege that the defendants being then and there in the said land, were found by one H. S., the servant of one B. W. W., and there with the said guns assaulted and beat the said H. S., &c.

Held, that the count was defective for not alleging that the defendants were in the close armed with guns, &c., according to the language of the 9th section of the statute.

Semble, that in an indictment under the 9th section, which makes it a misdemeanor if any persons to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbit, any of such persons being armed, &c., it is sufficient to allege that the defendants "UNLAWFULLY" entered, without alleging the particular facts which rendered the entry unlawful.

Semble, that the allegation that the defendants entered for the purpose of taking or destroying game is sufficient, without specifying the particular description of game.

An indictment under the 9 Geo. 4, c. 69, s. 8, alleged that the defendants on the 15th day of December, 1850, at the parish of F., in the county of B., "about the hour of six in the night of the same day, being then and there respectively armed with guns and other offensive weapons, did then and there together by night as aforesaid, and armed as aforesaid, unlawfully enter certain land called O. C. there situate, and were then and there by night as aforesaid, and armed as aforesaid, together unlawfully in the said land for the purpose THEN AND THERE of taking and destroying game." Query, whether the words "then and there" last-mentioned amounted to an allegation that the defendants were then on the land for the purpose of taking game by night, and whether, if not, an express averment to that effect was necessary?

Held also, per Patteson, J., that in order to support a conviction under this indictment, the evidence must show that all the three men actually entered the coppice, and that a constructive entering was insufficient.

THE prisoners were indicted for night poaching, and also for an assault on a gamekeeper.

The 1st count of the indictment was under the statute 9 Geo. 4,

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

c. 69, s. 9, and alleged that the defendants, together with others to the number of three and more, on the 15th day of December, 1850, at the parish of Fawley, in the county of Berkshire, "about the hour of six in the night of the same day, being then and there respectively armed with guns and other offensive weapons, did then and there together by night as aforesaid, and armed as aforesaid, unlawfully enter certain land called Oakley Coppice there situate, and were then and there, by night as aforesaid, and armed as aforesaid, together unlawfully in the said land for the purpose then and there of taking and destroying game against the form of the statute," &c.

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The second count was as follows:—"And the jurors aforesaid, &c., present that the said Henry May and Richard Darling, late, &c., together with divers other persons to the number of three and more to the jurors aforesaid unknown, on the 15th day of December, 1850, at the parish aforesaid, in the county aforesaid, about the hour of six in the night of the same day, with guns and other offensive weapons, did then and there together enter certain land called Oakley Coppice there situate, for the purpose then and there of taking and destroying game; and that the said Henry May and Richard Darling were then and there in the said land by night as aforesaid, by one Henry Edward Skelton, the servant of one Bartholomew Wroughton, then being the owner of the said close, the said Henry Edward Skelton then and there having lawful authority to seize and apprehend the said Henry May and Richard Darling, found, and that the said Henry May and Richard Darling with the guns aforesaid which they the said Henry May and Richard Darling then and there respectively in their hands respectively held, did then and there unlawfully assault, and beat, and offer violence towards the said Henry Edward Skelton, the said H. E. S., then and there being lawfully authorized to seize and apprehend the said Henry May and Richard Darling, against the form of the statute in such case made and provided, &c.

There were two other counts (3rd and 4th) in the indictment, similar to the 1st and 2nd, but describing the close by the name of the occupier.

At the commencement of the trial,

P. M'Mahon (for the defendants) objected to the 1st and 3rd counts on several grounds. First, that they did not particularize how the entry of the defendants on the land was unlawful. The question whether the entry was lawful or unlawful depended upon particular facts which should have been averred, as, that the entry was without the license of or was against the consent of the party entitled to grant it. It was insufficient merely to allege that the defendants entered unlawfully, as that in effect left a question of law for the decision of the jury. He also objected that the particular kind of game which the defendants were alleged to be in pursuit of should be specified. The statute mentioned "game or rabbits" but game was *nomen collectivum*, and sect. 13 of the 9 Geo. 4, c. 69, enacted that the word game shall be deemed

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to include hares, pheasants, partridges, grouse, heath or moor game, black game and bustards. The indictment should have mentioned whether hares, pheasants or partridges, &c., were the objects of the defendants. A third objection was, that the above counts did not aver that the defendants were on the land for the purpose of taking and destroying game by night. The indictment stated that the defendants "were then and there by night as aforesaid and armed as aforesaid, together unlawfully in the said land for the purpose *then and there* of taking and destroying game. He contended that the words *then and there* merely referred to the day and year and the particular close or land previously mentioned, and that the word "then" did not include the hour of the night or night at all. It was evident that it was so limited in the previous parts of the count, for the words "by night" were introduced after "then and there." If not included in the word "there" in one part of the indictment and therefore a necessary addition, it could not be said to be so included here.

PATTESON, J., expressed an opinion that the two first objections as to particularizing the unlawful means, and specifying the description of game could not be supported in arrest of judgment, but thought the last objection worthy consideration. He would not, however, discuss the matter further now, but would reserve the whole of the objections for the Court of Criminal Appeal, if such a course became necessary.

The trial then proceeded.

At the close of the case for the prosecution,

P. M'Mahon, for the defendants, submitted that the 2nd and 4th counts of the indictments for the assault were defective, and did not allege any statutable offence. To convict of an assault, under the 2nd section of the stat. 9 Geo. 4, c. 69, it was necessary that the defendants should at the time be in the act of committing an offence against the game laws by night-poaching, and that such offence should be duly and completely alleged. In this case it was evidently intended to allege that the particular offence which the defendants had committed at the time of the alleged assault, was that described in and provided for by the 9th section of the act, namely, that the defendants and others, to the number of three or more, entered the close in question *armed* with guns, &c., and were there together *armed*. The language of the section (9 Geo. 4, c. 69, s. 9) was, "That if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game, or rabbits, any of such persons *being armed* with any gun, cross-bow, fire arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor," &c. The being armed was of the essence of the offence, without allegation as well as proof of which, an indictment on the count itself would be fatally defective; and such allegation could not be said to be less necessary where the offence was an assault committed under the same

statute, and to support which it was necessary to prove the complete offence, under the 9th section, upon which the inducement was evidently framed. Now, the count omitted to state the essential fact required by the statute that the defendants entered and were in the close armed, and consequently it did not allege a material and essential fact.

PATTESON, J., after looking at the indictment, said the fact appeared to be as stated, and inquired what answer the counsel for the prosecution had to make to the objection. It there certainly appeared to be a fatal omission.

Skinner, for the prosecution, admitted the force of the objection, and said, under the circumstances, (b) he should abandon the 2nd and 4th counts, and rely on the 1st and 3rd counts for night poaching.

On those counts the evidence was that the gamekeeper of Mr. Bartholomew Wroughton, at seven o'clock in the evening of the 15th of December, heard a shot fired in the direction of one of his master's preserves, called Wells Coppice, in Fawley Woods, and proceeded towards it, but hearing another shot fired in the direction of another coppice, called Oakley Coppice, turned towards it, and when he came near it, saw three men, the prisoners, and a third man coming along a field by the side of a public pathway, within a few yards of the coppice, and as though coming from it. He went up to them. A struggle ensued, in which Darling took no part. The third man escaped, and May was captured; and near the scene of the struggle, five pheasants, recently killed, were found. Darling had been seen about an hour before walking alone along a public pathway in the direction of the Fawley Woods.

On these facts, *McMahon* submitted that there was no proof that all the three men entered into the coppice named in the indictment. One might have gone in, the others stopping outside, and that, he submitted, would not constitute the offence provided against by the statute. All the three men must be corporally, and not merely constructively in intendment of law, present in the place named in the indictment. He was then stopped.

His Lordship said he was entirely of opinion that the three men must have actually entered the coppice in order to constitute this offence. This subject had been very fully and learnedly discussed in a well-known note to Russell on Crimes, by an eminent member of this circuit, and in the views there expressed he entirely concurred. (c) Indeed, if the constructive presence were alone suffi-

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(b) The defendant May had been already convicted on an indictment for wounding Skelton with an intent to do him grievous bodily harm.

(c) In the note referred to by the learned judge, Mr. Greaves says, "The object of the clause was to protect keepers from violence. Now, it is obvious, that if less than three be in the close, there is less danger of violence than if three be in it. If three be in the close, they are ready to assist each other in committing violence. If some be out of the close, they must get into the close before they are in a position to commit it, and in some cases this might be impracticable. Thus, in the case put by the very learned baron, of part going down one side

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cient it would follow that if three men went out to poach, and each entered on a separate piece of land, each of the three would be in three different places at the same time, a conclusion which was utterly absurd. The question had been recently before the judges, and a majority were against the view which he entertained, (*d*) but he was so satisfied that the question ought to be discussed again, that if it should become necessary in this case, he would reserve it for the Court of Criminal Appeal. He would, therefore, if the prisoners should be found guilty, ask the jury to

of a hedge, and part down the other, the hedge might be so strong that the one part could not get through it to assist the other in an attack upon keepers, and many similar cases might be put. As to the words, they seem strongly to indicate that there must be an entry by all three, and all three 'together.' The word 'together' is very important. If three poachers went to a wood of very large size, and each entered it separately at far distant points, they would have been within the clause if the word 'together' had been omitted. Again, the words are 'any of such persons being armed.' Suppose that the one that entered was not armed, but that one of the others was, then if it were held that the offence was complete, it would be so holding, although no person armed had entered the land. If it were held necessary that the one who entered should be armed, it would be limiting the arming to one particular individual, instead of leaving it indefinite which was armed. Difficulties would also arise from holding the entry of one to be the entry of all. Suppose three poachers went out with the common design of taking game in a narrow plantation, and the fields on each side of it, and that one went up the plantation, and one up each adjacent field, all being near enough to assist in killing game, according to such a construction, each would be guilty of three distinct offences; in other words, all three would be together in three different closes, *uno eademque tempore*. The instance of burglary is not analogous, because that offence does not consist in an entry by 'three or more together,' but by one person. As soon, therefore, as an entry by one is shown, the crime is proved, and then the question is, whether others engaged in the same transaction were principals in the second degree, or accessories. Here the question is, whether the crime has been committed. In burglary, and, indeed, in most, if not all, common law offences, where several persons are present at the commission of a crime, the indictment may either state the facts, according to their legal effect, i. e., that all committed the act, or as they occurred, i. e., that one did the act, and that the others were present aiding and assisting. If, therefore, the case of burglary were analogous, an indictment alleging that one entered the field, and that the others were present aiding and assisting, ought to be good; and yet it is conceived no such indictment could be so framed as to give effect either to the word 'together,' or to the indefiniteness of the words 'any of such persons being armed.' It is to be observed also, that sect. 2 only authorizes the apprehension of those who are 'found upon any land,' so that the persons not in the field could not be apprehended under that section. The Game Act, 1 & 2 Will. 4, c. 32, s. 32, which applies to 'any persons to the number of five, or more, found upon any land' may also be referred to as showing that there must be an entry by all, for how could it be said that finding one person in a field, with four in the adjoining field, was finding five together in the field where the one was found? On the whole, it is submitted that, unless there has been a bodily entry by three together, the offence is not complete." (1 Russell on Crimes, by Greaves, p. 476, *note*.)

At the time Mr. Greaves wrote the above observations, Mr. Justice Patteson had held that all parties indicted under the 9th section must have been actually present in the close: (*R. v. Donnell*, 6 C. & P. 398; and MSS. 1 Greaves's Russell on Crimes, vol. 1, p. 476, *note*.) But Mr. Baron Alderson had subsequently held the contrary doctrine on two occasions (*Rez v. Pussey*, 7 C. & P. 282; *Rez v. Lockett*, 7 C. & P. 300), considering the case as analogous in this respect to the offence of burglary, where it is not necessary that all the parties should be actually in the house, those who are outside assisting being equally principals.

In *Reg. v. Britton & Garod*, Essex winter assizes, 1843 (for a note of which I am indebted to my learned friend Mr. P. M'Mahon), the above case being cited, Mr. Justice Erskine said, though he had great respect for the very learned Baron (Alderson), still he thought there was no analogy between this offence, which was a misdemeanor and burglary, and that under the statute in question all three must enter bodily on the land.—[J. E. D.]

(*d*) *Reg. v. Whittaker*, 3 Cox Crim. Cas. 50; 1 Den. C. C. 310; 2 C. & K. 636.

say whether they were of opinion that all the three men entered bodily into the coppiece.

M^r Mahon then addressed the jury.

Verdict—Not Guilty.

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v.
MAY
AND DARLING.
1851.

*Indictment—
Assault.*

[Since the above case, the question raised in it, as to the necessity for the three or more persons charged with entering land by night for the purpose of destroying game, being together in the *same* identical close or land, has been brought before the Court of Criminal Appeal (*Reg. v. Uzzell and others*, Easter Term, 1851, see *post*, p. 188; 15 Jur. 434), and it was held by the court (consisting of Lord Campbell, C. J., Parke, B., Alderson, B., Coleridge, J., Platt, B., and Talfourd, J.) that such actual presence was not necessary. The judgment of the court did not proceed upon the ground taken in the previous cases on this subject, namely, that all parties acting together and in adjoining closes, are constructively present in any one of those closes; but that under the words of the statute "any land" is sufficient, if the parties be unlawfully on any land whether in the occupation of the same or, as Lord Campbell expressed it, of fifty different persons, if they were all at that time of the same company, and with one common purpose of destroying game; and that the meaning of the statute is that if all three persons should be in one common party, with one common illegal purpose upon any land,—not that if all three should be on the same land together—the offence shall be complete.

The indictment in this case contained a count, describing the land as in the occupation of C. W., and not by name, and as all the parties were seen upon land in the occupation of C. W., although in different closes, it was it seems upon this count that the court must have held the conviction to be rightly founded.

Notwithstanding this decision, the question cannot be considered as settled. The case was not argued by counsel, and the learned judges who dissented from the judgment in *Reg. v. Whitaker*, were not present on this occasion.—J. E. D.]

OXFORD CIRCUIT.

Oxford, March 5, 1851.

(Before PATTESON, J.)

REG. v. BEECHAM. (a)

Larceny—Railway tickets—Property in.

The fraudulent taking of a railway ticket for the purpose of using it to travel, and so defrauding the Railway Company, is larceny, although the ticket would, if used, be returned to the company at the end of the journey.

THE indictment in the first count charged the prisoner with the larceny, on the 8th of February, 1851, of three railway tickets of the value of six pounds three shillings, and three pieces of pasteboard of the value of one penny, the property of the London and North Western Railway Company.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

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v.
ROBINSON.

1850.

Evidence—
Notice to
produce.

that in a misdemeanor, notice served on the defendant would be sufficient, because, when a prisoner was charged with such an offence, his papers were not taken away from him in the prison. But the charge here was a felony. To make the notice of any value, the person on whom it was served must have had the means of acting on it. Service on a lunatic would not be sufficient.

POLLOCK, C. J.—It is certainly not usual in civil cases to give a fresh notice after the postponement of a trial from sitting to sitting; and I can see no difference in this respect between civil cases and criminal ones.

ERLE, J.—I think also that the service for the first session is available for the subsequent one, and am of opinion that service on the prisoner himself is sufficient. Although the prisoner was not a free agent, he had the means of communicating with his legal adviser and through him of obtaining the document. The argument used here might be just as applicable to a case where the notice was served on a person bed-ridden or incapable of moving.

Secondary evidence admitted.

Clarkson for the prosecution.

Parry for the defence.

COURT OF CRIMINAL APPEAL.

April 26, 1851.

(Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J.,
PLATT, B., and TALFOURD, J.)

REG. v. FORD AND OTHERS. (a)

Cross-examination by prisoner's counsel—Use of deposition.

The counsel for a prisoner, on cross-examining a witness for the prosecution, is not entitled to put the deposition of the witness into his hand, for the purpose of refreshing his memory, without giving it in evidence.

THE prisoners were tried at the Staffordshire Spring Assizes for 1851, before C. S. Greaves, Q. C., who stated the following

CASE.

The prisoners were indicted for a burglary in the dwelling-

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

house of Edward Johnson, and stealing therefrom two hams. It was clearly proved that the burglary had been committed by some person or persons, and that a large and small ham had been stolen. The next morning but one after the burglary Higginson and Maddock, being found in possession of the large ham so stolen, were apprehended. Maddock, whilst in custody, made a statement to a policeman, in consequence of which the policeman went with Maddock to Ford, and asked Ford "Where the hams were that he had bought of Higginson?" Ford, at the time, denied having any hams; but, on the way towards his house, he said to the policeman, "I have the little ham at home, but I know nothing at all about the big ham." The policeman added that neither he nor Maddock had said anything about little or big hams in Ford's hearing before Ford made this statement. On cross-examination the policeman was several times asked whether Maddock did not say, in Ford's hearing, when he first met with Ford, "That is the man that bought the big and the little hams;" which he as often denied. The prisoner's counsel then proposed to put his deposition into his hand, to desire him to read it, and having done that, to ask him "Whether he adhered to the statement that nothing had been said about the big or little ham in Ford's hearing before Ford made the statement about them?" But the prisoner's counsel did not propose to put the deposition in evidence. The deposition was signed by the policeman, and contained a statement that, when the policeman met Ford, Maddock said, "That is the man that bought the big and little hams." I consulted Patteon, J., and finding that he had an impression that the course proposed had been permitted by some of the learned judges, but that his opinion was opposed to it, and entertaining myself a very decided opinion against such a course, and having on a previous day in the same assizes refused to permit it to be adopted, I thought it better to refuse to permit it in the present instance; but out of respect for the opinion of any learned judge who might have permitted such a course, and in order that a point so likely to occur at the sessions as well as at the assizes might be finally settled, to reserve this case for the opinion of Her Majesty's judges. And I respectfully request their opinion whether the prisoner's counsel was entitled, as a matter of right, to put the deposition into the witness's hand, to desire him to read it, and then to ask him whether he adhered to the statement he had made?

William Ford was convicted and sentenced to twelve calendar months' imprisonment, with hard labour.

The case was not argued by counsel.

LORD CAMPBELL, C. J.—The judges are all of opinion that the course which the prisoner's counsel wished to take ought not to be allowed. Indeed it appears from a manuscript note furnished to me by Mr. Baron Parke, that the matter is "*res judicata*." The note is as follows:—"Some cases occurred before my brother Coltman, at York, and myself, at Liverpool, in which the counsel for the prisoner, in cross-examining a witness for the

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Cross-examina-
tion—
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prosecution, offered to put into his hand his deposition before the magistrate; and then proposed to ask him whether, having looked at the paper, the witness still persevered in the statement already made in his examination in court. We had some doubt as to the propriety of this course; but it having been permitted by some judges, we thought it right to allow it, as it is very desirable that uniformity should prevail in the practice in this respect. I have to request the opinion of the judges whether we were right.—Dated the 23rd of April, 1843.—J. PARKE.”

Answer.—The judges are of opinion that the course pursued in this case is inexpedient, and ought not to be allowed for the future.
29th April, 1843.

(Signed)

DENMAN, C. J.
TINDAL, C. J.
PARKE, B.
ALDERSON, B.
PATTESON, J.

WILLIAMS, J.
COLTMAN, J.
ERSKINE, J.
ROLFE, B.
CRESSWELL, J.

After that decision the question is certainly not open for argument; and I entirely concur in the decision. I have always considered it an improper and inexpedient practice, though, hitherto, I have not had the courage to prevent it; but the matter is now settled for the future; and the proper course to be pursued is that pointed out in *The Queen's case* (2 Brod. & Bing. 289.) The deposition should either be read to the witness at the time of the cross-examination, and before the questions as to its contents are put, or should be given in evidence by the cross-examining counsel in the usual course as part of his own case. (b)

ALDERSON, B.—I am entirely of the same opinion. If the deposition is not put in evidence, it is impossible to tell whether it contains the same or a different statement from that which the witness makes in court; and a false impression may be produced upon the jury by the cross-examination. The two statements may be precisely the same; and yet this line of cross-examination would naturally lead the jury to suppose that they were different.

The other judges concurring,

Conviction affirmed.

(b) The following is the judgment in *The Queen's case*, cited by Lord Campbell:—

ABBOTT, C. J.—My lords, the judges have conferred upon the question last proposed to them by your lordships. The first part of your lordships' question is in these words:—“Whether, when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below whether he did or did not in such letter make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence, to manifest that such statements are or are not contained in the letter?” My lords, in answer to this part of your lordships' question, I am to inform your lordships that the judges are of opinion in the case propounded, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter; but that the letter itself must be read to manifest whether such statements are or are not contained in that letter. My lords, in delivering this opinion to your lordships, the judges do not conceive that they are presuming to offer to your lordships any new rule of evidence, now, for the first time, introduced by them; but that they found their opinion upon what, in their judgment, is a rule of evidence as old as

COURT OF CRIMINAL APPEAL.

April 26, 1851.(Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J.,
PLATT, B., and TALFOURD, J.)

REG. v. WILLIAM POTTER. (a)

*Indictment for breaking and entering a counting-house—What is a counting-house within 7 & 8 Geo. 4, c. 29, s. 15.**A place called the machine-house at chemical works, where a weighing machine was kept, goods weighed, and an account of weights kept in a book; where the account of the workmens' time was taken and entered in books not kept there, but brought there for the purpose; and where their wages were paid,**Held, properly described as a counting-house in an indictment for breaking and entering that building and stealing therein, under 7 & 8 Geo. 4, c. 29, s. 15.*

THE following case was reserved by Cresswell, J.:—

CASE.

The prisoner was indicted for breaking and entering the counting-house of David Gamble, at the parish of Prescot, and stealing therein 600 pennies, &c., the moneys of David Gamble. It appeared in evidence, on the trial before me at Liverpool, that David Gamble was the proprietor of extensive chemical works at Prescot, and that the prisoner broke and entered a building, part of the premises of David Gamble, which was commonly called the machine-house, and stole therein a large quantity of copper money. In this building there was a weighing-machine, at which all goods sent out were weighed, and one of Gamble's servants kept in that building a book in which he entered all goods weighed and sent out. The account of the time of the men employed in different

any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence. The latter part of your lordships' question is, "In what stage of the proceedings, according to the practice in the courts below, such letter could be required by counsel to be read, or be permitted by the court below to be read?" My lords, in answer to this, I am to inform your lordships that the judges are of opinion, according to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel as part of his evidence in his turn after he shall have opened his case; that that is the ordinary course; but that if counsel who is cross-examining suggest to the court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below, and for the convenient administration of justice the letter is permitted to be read at the suggestion of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence."

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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*Breaking
and entering a
dwelling-house.*

departments was taken in that building, and their wages were paid there. The book in which their time was entered was brought to that building for the purpose of making the entries and paying the wages. At other times they were kept in another building, called the office, where the general books and accounts of the concern were kept. It was objected for the prisoner that the building broken and entered by him was not properly described as a counting-house. The jury found the prisoner guilty, and I abstained from passing any sentence, wishing to have the opinion of this court on the question whether the prisoner can be punished for breaking and entering a counting-house and stealing therein, or for simple larceny only. In the meantime he remains in custody.

The case was not argued by counsel.

LORD CAMPBELL, C.J.—We have considered this case, and are of opinion that the conviction is right. There was abundant evidence to show that this building was a counting-house, and that being so, the case comes within the statute 7 & 8 Geo. 4, c. 29, s. 15.

The other judges concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 3, 1851.

(Before LORD CAMPBELL, C.J., PARKE, B., ALDERSON, B.,
COLERIDGE, J., PLATT, B., and TALFOURD, J.)

REG. v. UEZZELL AND OTHERS. (a)

*Night poaching—Stat. 9 Geo. 4, c. 69, s. 9—Indictment—Land described
by name of occupier—Entering particular closes.*

If an indictment under sect. 9 of Geo. 4, c. 69, the night poaching act, describes the land entered, as certain land in the occupation of A. B., or of A. B. and C. D., in the parish, &c., it is sufficient; and if three of one party are proved to have entered any land answering such description, whether they were all in the same close or not, they may properly be convicted, if the other ingredients of the offence are established.

THE following case was reserved by Baron Parke:—

CASE.

The prisoners were tried before me at the last assizes at Hertford for night poaching, and found guilty on 9 Geo. 4, c. 69.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

The prisoners, Uezzell and Parking, were not sufficiently identified and therefore acquitted. Eaton was found guilty. He was one of the three persons who went together, armed with guns in the night, to destroy game. The three were proved to have been together in one of the closes mentioned in the indictment, called The Thirteen Acres, but not for the purpose of killing game in that close, for there was none there, nor on an adjoining close, by shooting from it. They were passing along it to another place. One, at least, of the three was in a close, mentioned in the indictment, called The Spring, which had pheasants in it, for the purpose of destroying game in that close, but the whole three were not; they were all, however, at the time, of the same company, and with that common purpose. There is one count in the indictment, the fourth, stating that the prisoners were in inclosed land, occupied by Charles White. The Spring, and The Thirteen Acres were contiguous, separated by a fence, and were both in the occupation of Charles White. There is a question, whether this will make any difference. I respited the judgment in order to take the opinion of the judges on this unsettled question. (*Vide* Russell on Crimes, Mr. Greaves's note, 476; and *Reg. v. Whittaker* (1 Den. C. C. 310; 3 Cox Crim. Cas. 50.) (b))

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No counsel were instructed to argue the case.

LORD CAMPBELL, C. J.—Upon the 4th count we think that the conviction is right, and ought to be affirmed. I may add, that the confusion which has arisen upon this head of law, seems to me to have proceeded from not referring to the very words of the act of Parliament. It seems to have been held, several times, that the three persons must have entered the inclosed fields described in the indictment, in order to take game there; but the act of Parliament (9 Geo. 4, c. 69, s. 9) says, that “if any persons to the number of three or more together, shall by night unlawfully enter or be on any land, *whether open or inclosed*, for the purpose of taking or destroying game, any of such persons being armed, &c.,

Judgment.

(b) [In *Whittaker's case* the following is Baron Parke's note of the decision: (1 Den. C. C. 318) “The judges in this case did not think it necessary to decide whether it would be an offence within the statute, if a party of three or more together, one being armed, entered into and were in land, consisting of two or more inclosures in the same or different occupations, because here the form of the indictment made it essential to prove that the offence was committed in the field occupied by Ratcliffe. Five of the judges (Parke, B., Patteson, J., Cresswell, J., Platt, B., Williams, J.) were of opinion that to constitute a statutable misdemeanor, the party must enter into and be bodily in the close, and that if three were in the close and three out, the latter were not guilty; and as the three who entered could not in this case be ascertained, all were entitled to be acquitted. Seven of the judges (Lord Denman, C. J., Wilde, C. J., Pollock, C. B., Rolfe, B., Coltman, J., Wightman, J., Erle, J.) thought that if three were in the close, one being armed, they were guilty, and that all others who were together with them aiding and assisting were guilty of the same misdemeanor though they were not in the field. The conviction was therefore held good.” In the note referred to by Baron Parke, Mr. Greaves considers the question under two states of facts: “first, where less than three enter the land, the others being near enough to aid and assist; secondly, where three enter and others are near enough to aid and assist;” and his argument is, that in the first case supposed the offence is not complete; and that in the second case those near enough to aid and assist are not guilty of the offence, but only the three who actually enter. *Whittaker's case* overrules the second position; and the present case overrules or very materially qualifies the first. It will be observed upon reading the note that Mr. Greaves uses the terms “land” and “close” convertibly; thus, in arguing upon the first of the two supposed cases above—

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each and every of such persons shall be guilty of a misdemeanor." A practice has been introduced of naming a particular close (as Blackacre and Whiteacre), in indictments upon this statute; but that is quite unnecessary. It has been properly held insufficient to say merely "a certain piece of land in the parish of A.;" there must be something to identify the land. But it is quite enough to allege the entering upon certain land in the occupation of J. S., and then, if three persons together and armed are on any part of that land for the purpose of destroying game, they may be convicted, though there are fifty fields, and one of the three was in Blackacre, another in Whiteacre, and the third in Greenacre. This will get rid of all that subtlety of discussion about some being on one side of a hedge, and some on another. If all are on any part of the land described for the purpose of taking game on the land, and they form one party, the statement in the indictment is proved; and so we think the 4th count of this indictment is proved.

PARKE, B.—I am of the same opinion. It is enough if three of one party are in any land described in the indictment, even though it be in different occupations, and whether open or inclosed. The word "open" in the statute was probably intended to apply to common or waste land. The able and elaborate note of Mr. Greaves proceeds on the wrong assumption, that all three must be in one close. At one time I was rather inclined to take a different view of this case; but now I think that those prisoners who were all upon land in the occupation of White, described in the 4th count, may be convicted upon that count.

ALDERSON, B.—The land must be described; but if it is alleged that they entered two pieces of land, one open and one inclosed, that would do.

The other Judges concurred.

Conviction affirmed.

mentioned he submits that, "whether we look at the object or the words of the clause there must be an actual bodily entry by three persons *into the close* to bring the case within sect. 9. The object of the clause was to protect keepers from violence; now it is obvious that if less than three be in the close there is less danger of violence than if three be in it; if three be in the close they are ready to assist each other in committing violence; if some be out of the close they must get into the close before they are in a position to commit it, and in some cases this might be impracticable; thus in the case put by the very learned Baron (Alderson), of part going down one side of a hedge and part down the other, the hedge might be so strong that the one part could not get through it to assist the other in an attack upon keepers, and many similar cases might be put." No doubt; but they obviously assume that it is essential, under the statute, to point out some particular field or close which has been entered; and if the word "land" in the statute could be so limited, the elaborate and ingenious argument of Mr. Greaves would be entitled to great weight. It is, however, not difficult to imagine that if the statute had been so framed, a skilful distribution of a party of poachers might have rendered the statute almost inoperative, without materially diminishing the mischief, against which the statute was directed.]

[See also *Reg. v. May and Darling*, ante, page 176.]

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May 3, 1851.

REG. v. CLEMENTS. (a)

(Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J.,
PLATT, B., and TALFOURD, J.)*Deposition of witness absent from illness—Grand Jury—11 & 12
Vict. c. 42.**The deposition of a witness who is prevented from attending by illness
may be used before the grand jury as well as the petty jury.**Quære—Whether this court has any jurisdiction to decide such a question;
and whether the improper reception in evidence of a deposition before
the grand jury would invalidate a conviction.*

CASE.

AT a general quarter sessions of the peace of our Lady the Queen, holden at Maidstone, in and for the county of Kent, on Tuesday, in the week next after the 28th day of December, to wit, the 31st day of December, in the fourteenth year of the reign of our Sovereign Lady Queen Victoria, before the Right Hon. Charles Earl of Romney, Aretas Akers, James Espinasse, Esqrs., and others their associates, justices of our said Lady the Queen, assigned to keep the peace of our Lady the Queen, in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county perpetrated, a bill of indictment was preferred against John Clements and John Smith, for larceny. Upon the bill being sent before the grand jury, and the prosecutrix not appearing, they sent for the attorney for the prosecution, and intimated to him that they could not proceed with the bill without having the depositions of the prosecutrix thereupon. Counsel for the prosecution applied to the court to order these depositions to be read in evidence before the grand jury, and stated that the prosecutrix was an aged woman, and too ill, from infirmity, to travel to the sessions; that the depositions had been taken by the magistrates at the dwelling-house of the prosecutrix, in the presence of the prisoners, who had an opportunity of cross-examining the prosecutrix; and that the depositions were signed by the prosecutrix, and the magistrate, and that the witnesses, to prove these facts, and the illness of the prosecutrix, were in attendance, and their names were on the back of the bill

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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Deposition—
Grand Jury—
11 & 12 Vict.
c. 42.

of indictment, which facts were afterwards proved on the trial, and the depositions of the prosecutrix read in evidence, in pursuance of the statute 11 & 12 Vict. c. 42, s. 17. Counsel for the prisoner objected to the depositions being sent before the grand jury, on the ground that in the absence of the prosecutrix, her depositions were not admissible as evidence before the grand jury, either at common law, or by stat. 11 & 12 Vict. c. 42, s. 17, which makes it lawful to read such depositions in evidence "upon the trial;" and it was contended that the word "trial" meant trial before the petty jury, and did not apply to the preliminary proceedings before the grand jury. The court overruled the objections, and ordered the depositions to be sent to the grand jury, who thereupon returned a true bill, to which the prisoner pleaded "not guilty," and upon which they were tried, convicted, and sentenced to nine calendar months' imprisonment in the house of correction, with hard labour, where they now remain. On the application of the prisoners' counsel, the court of quarter sessions consented to submit, for the opinion of the Court of Criminal Appeal, whether, under the circumstances above stated, it was competent to the court of quarter sessions to send the depositions of the prosecutrix before the grand jury, to be used by them as evidence in her absence.

No counsel were instructed in this case.

Judgment.

LORD CAMPBELL, C. J.—In this case our opinion is asked whether a deposition taken under the 11 & 12 Vict., where a witness is unable to appear from illness, can be made use of before the grand jury. Now, we entertain considerable doubt whether the question can properly be adjudicated by us under the authority by which we sit here; and we likewise entertain some doubt whether such an objection would be sufficient to invalidate the conviction. But, as our opinion is asked, we have no difficulty in saying that, in our opinion, upon a joint construction of the act of Parliament, the deposition may be made use of before the grand jury as well as before the petty jury, after the indictment is found; for the act of Parliament says "If upon the trial of a person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition, as evidence in such prosecution." Now, we think that the word "trial," as it is here used, coupled with the word "prosecution," shows that the deposition may be made use of before the grand jury, as well as before the petty jury, and that such must have been the intention of the Legislature. Therefore, upon every consideration of the case, the conviction must be affirmed.

ALDERSON, B.—It is very doubtful whether you can take an objection at all as to what passed before the Grand Jury, seeing that the witness was bound by the Grand Jury to give the evidence. Suppose there were only one witness before the Grand Jury on a charge of perjury, and they found a bill, if it was tried before the Petty Jury, how are you to prove that that was the case?

Judgment affirmed. (b)

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COURT OF CRIMINAL APPEAL.

January 18, 1851.

(Before JERVIS, C. J., PATTESON, J., CRESSWELL, J., ERLE, J.,
and MARTIN, B.)

REG. v. KEALEY. (a)

False pretences—Indictment—Description of persons to whom false pretence made—Variance—Surplusage.

An indictment charged the defendant with having attempted, by false pretences made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B. and others. On the trial it was proved that the pretences were, in fact, made to J. B. alone, with intent to defraud J. B. and certain other persons, his partners, of property belonging to the firm.

Held, that there was no variance between the indictment and the proof. The words "and others" in the description of the persons to whom the pretences were alleged to have been made might be rejected as surplusage.

THE following case was stated for the opinion of the judges by Mr. Russell Gurney, Commissioner of the Central Criminal Court:—

(b) In *Reg. v. Gibson* (1 Car. & M. 672), Parke, B. held that a witness for the prosecution in a case of felony may be asked, on cross-examination, whether he has not stated certain facts before the Grand Jury, and that the witness is bound to answer. But in *Reg. v. Russell* (*ibid* 247), Gurney, B. and Wightman, J. decided that when the Grand Jury have found a bill, the judges before whom the case comes on to be tried, ought not to inquire whether the witnesses were properly sworn before they went before the Grand Jury; and intimated that an improper mode of swearing them would not vitiate the indictment, as the Grand Jury are at liberty to find a bill upon their own knowledge merely. As to the concealment of evidence given before the Grand Jury, the reason formerly assigned was to prevent it from being contradicted by subornation of perjury on the part of the person charged; but now that prisoners are in most cases entitled to copies of the depositions taken before the magistrates, that ground has been removed; and Mr. Greaves, citing 4 Chitt. Cr. L. 183, expresses an opinion that the oath of secrecy does not apply to the facts proved before the Grand Jury.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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At a general Session of Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, on Monday, the 10th day of June, in the year of our Lord 1850, Mortimer Kealey was tried before me upon an indictment charging him with the common law misdemeanor of attempting to obtain goods by false pretences, and to defraud the owners thereof, contrary to the statute. The indictment charged that the defendant made the pretences set forth in the indictment to John Baggalley and others, with intent to obtain and defraud them of the goods in question, their property. John Baggalley and others were partners in trade, and it appeared in evidence that the defendant, in fact, made those pretensions to John Baggalley, one of that firm, but that Mr. Baggalley refused to part with the goods sought to be obtained, in consequence of information regarding the defendant received from another person; it also appeared that none of Mr. Baggalley's partners were present when the pretences were made, and there was no evidence of the false pretences having ever reached the ears of any one of them. It was objected on the trial that the proof did not support the averment in the indictment of the pretences having been made to John Baggalley and others, that the variance was fatal, and the prisoner entitled to his acquittal. But I decided that the objection ought not to prevail, and the defendant was convicted. It appearing, however, to me, that the point raised on the trial was one of doubt and entitled to the consideration of the Justices of either Bench, and the Barons of the Exchequer, upon a case reserved, I postponed judgment, in order that the opinion of the said justices and barons might be taken upon such case, and committed the defendant to the custody of the keeper of the gaol of Newgate until next sessions, unless he previously entered into recognizances, himself in 200*l*., and one surety in 200*l*., or two sureties in 100*l*., for his appearance at the said next sessions, to receive judgment. The foregoing is the case upon which the opinion of the said justices is required accordingly.

(Signed) RUSSELL GURNEY.

Parry (for the prisoner) submitted that there was a fatal variance between the pretences alleged in the indictment and those proved. 1st. The allegation as to the person to whom the pretence was made was material; and, 2ndly, whether material or not, having been made, it must be strictly proved. In indictments for false pretences, the statement of the pretence and of the person to whom it was made was material, because the defendant would otherwise have no notice of the charge he was called upon to meet; and although this was not a charge of obtaining goods, but of endeavouring to obtain them, the same rule would hold. The allegation was, that the pretence was made to John Baggalley and others, while the evidence showed the pretence was made to John Baggalley alone.

PATTESON, J.—You do not object to the allegation that the intent was to defraud John Baggalley and others?

Parry said he did not, because if the goods which the defendant sought to obtain were in truth the property of the firm, that allegation would be proved; but there was no inference in law that a pretence made to one person was made to himself as well as to his partners. It was a question of fact, and no inference one way nor the other need be drawn.

CRESSWELL, J.—Suppose on such an indictment as this it was proved that there was a pretence made, first to one partner, afterwards to another, and subsequently to a third, would not that support the allegation?

Parry admitted that it might, but in such a case it would be necessary to prove that the pretences were made to the others?

CRESSWELL, J.—No; it is not necessary that all the pretences should be proved.

Parry contended that although all need not be proved, yet that the one on which the prosecution rested should be truly stated. If the pretence had been made to a clerk of the partnership firm, it would not be sufficient to allege that it was made to the partners.

MARTIN, B.—Suppose, in a civil case, you averred that you applied to two partners to sell goods, could it not be proved that you applied only to one.

JERVIS, C. J.—Or suppose that, in an indictment for an assault, it was charged that you assaulted A. and B., would it not do to prove that you only assaulted A.

PATTESON, J.—It is certainly usual to allege that the pretence was made to the person who was in fact applied to. It was so averred in the case of *R. v. Douglass* (1 Camp. 212), and also in that of *R. v. Plestow* (1 Camp. 494.)

Parry.—In the latter case the averment was, that the defendant said he had paid money into the Bank of England, and the proof was, that he had said, “money had been paid,” without saying by whom, and it was held a fatal variance. Surely there is a great difference between the pretence being made to several persons and its being made to one only. Then, if the allegation of the persons to whom the pretence was made was material, the indictment is bad for not naming them, since the 7 Geo. 4, c. 64, s. 14, does not apply to such a case as this.

JERVIS, C. J.—Suppose that the pretence was made in the presence of two or more, and only one heard it.

Parry.—It would be a question for the jury, whether it was in fact made to all. The *making* the pretence to them would be the material point. Whether or not they all heard it would be beside the question.

CRESSWELL, J.—Suppose four or five persons carry on a trade under the name of John Thomson alone, and a letter is addressed to John Thompson, containing a false pretence, could that be charged as a pretence made to John Thompson alone?

JERVIS, C. J.—Or suppose that, in fact there were no such per-

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son as John Thompson in existence, although the firm was carried on in his name, could the charge be laid in any other way than by alleging the pretence to have been made to the real partners?

Parry.—There could be no difficulty in alleging that they were made to John Thompson, meaning thereby the persons really composing the firm—the pretences being alleged according to the facts, and the facts explained by proper inuendoes. In *R. v. Mason* (2 T. R. 581), and in *R. v. Perrott* (2 M. & Sel. 386), the reasons why it is necessary that the pretences should be specified are fully explained. The necessity of averring the facts strictly is established for the purpose of giving a defendant full information with regard to the offence charged.

CRESSWELL, J.—I do not see how it can be alleged that this indictment does not give the defendant full knowledge of the crime he is charged with. It sets out the pretence, and it gives the name of one material person, and it cannot make any difference to the prisoner whether the pretence was made to one or many.

JERVIS, C. J.—In a case of slander it is usual to allege that the language was uttered in the presence of a named person and divers good and worthy subjects of this realm. Could there be a variance if it was proved to have been uttered in the presence of only one person.

Parry.—In *Masters v. Barrett* (2 C. & K. 715), a plea alleged that a promissory note was given for money lost at play to one J. G. It was proved that the money was lost to J. G. and others, and it was held that an amendment was necessary.

Ballantine (for the prosecution), was not called upon.

JERVIS, C. J.—I am of opinion that the conviction in this case was right. There are three ways in which it may be viewed. In one, that the statute 6 & 7 Geo. 4, c. 64, s. 14, may be engrafted on the case so that the expression “and others,” where it is alleged that the pretence was made to John Baggalley and others, may be taken to be the partners of John Baggalley. Then it would be important to consider whether representations made to one member of a firm may not be considered as made to all the members. But it is not necessary to express an opinion upon that point, or I should be disposed to decide in the affirmative. Secondly, it may mean that the representation was made to John Baggalley and several other persons. If so, it is quite plain that on proof that it was made to John Baggalley alone it would be sufficient. But there is a third view of the case, and that, I think, is the correct one, and that is, that the expression “and others” in the indictment is mere surplusage. Such an expression is not authorized by the statute; it need not be proved, and therefore need not be struck out.

PATTESON, J.—I think that “and others” could not necessarily mean the partners of John Baggalley, because the statute does not authorize such a description of partners in a case like this. If then, it does not mean that, it means nothing, and therefore is surplusage.

CRESSWELL, J.—I also think that evidence of a representation

made to John Baggalley will support an allegation that it was made to him and others.

ERLE, J.—I think that an allegation of a pretence made to John Baggalley and others admitted of no other proof than that it was made to him. If it was said to have been made to John Baggalley and John Noakes, that would be an allegation that it was made to each of them, and proof that it was made to one would be sufficient.

MARTIN, B.—I am strongly inclined to think that this charge is correctly made. The statement to one is a statement to all. The application for the goods is clearly made to the firm.

Conviction affirmed. (b)

Ballantine for the prosecution.

Parry for the prisoner.

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OXFORD CIRCUIT.

STAFFORDSHIRE SPRING ASSIZES, 1851.

March 19.

(Before TALFOURD, J.)

REG. v. CHILD. (a)

Perjury—Indictment—Jurisdiction of court—Statute 23 Geo. 2, c. 11—Variance—Trial before Queen's counsel acting as a commissioner—Evidence of judges' notes.

The statute 23 Geo. 2, c. 11, s. 1, enacts, that in indictments for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken, averring such court, or person, or persons, to have a competent authority to administer the same, &c.

Quære, whether an averment that the judges of assize before whom the oath was alleged to be taken, had "sufficient authority" to administer

(b) Throughout the above case it appears to have been assumed that the 7 Geo. 4, c. 64, s. 14, only applies to the statement of ownership of property, whereas its language would seem to extend to every occasion on which it may be necessary to mention partners, joint tenants, &c. The following is the section:—"That in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others as the case may be. And whenever in any indictment or information for any felony or misdemeanor it shall be necessary to mention for any purpose whatever any partners, joint tenants, or parceners or tenants in common, it shall be sufficient to describe them in the manner aforesaid. And this provision shall be considered to extend to all joint-stock companies and trustees."

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

it, is equivalent to an averment that they had "competent authority" for that purpose.

An indictment for perjury, alleged to have been committed on the trial of S. S., averred that the trial took place at the Assizes and General Sessions of the Delivery of the Gaol of our said Lady the Queen for the county of S., holden at, &c., before John Lord Campbell, C. J., of our said Lady the Queen, assigned to hold pleas before the Queen herself, and Sir E. V. Williams, Knt., one of the justices of our said Lady the Queen, of her Court of Common Pleas, assigned to deliver the said gaol of the prisoners therein being. It being objected that this was a defective description, as alleging a court with an impossible combination of civil and criminal jurisdiction :

Held that the word "assizes" might be struck out as surplusage.

It being also objected that the above words "assigned to deliver the said gaol of the prisoners therein being," referred only to the last-named judge:

Held that the indictment might be amended by the record of the conviction of S. S., by inserting, after the words "Common Pleas," "and others their fellows, justices," assigned to deliver the said gaol, &c.

The record of the conviction of S. S. described the court as a general session of "Oyer and Terminer and Gaol Delivery." It also described the charge against S. S. as "for cutting and wounding;" the indictment describing it as for wounding :

Held, that these variances might also be amended.

Quære, whether the allegation of a trial before two judges, without any allegation or addition of "and others their fellows," is supported by proof of a trial before a Queen's counsel, acting as a Commissioner of Oyer and Terminer, &c., and assisting the judges in that capacity.

Quære also, whether the commissioner not being specifically named in the indictment or in the record of the trial, coupled with the fact that the trial did not take place in the Crown Court, renders it necessary to produce the commission or to give any other evidence of the authority of the commissioner, and that he was acting in that capacity.

Semble, that if the trial took place in the Crown Court, no such proof of authority would be required.

The notes of evidence taken by a judge on a trial are not admissible in evidence to prove what was said on that trial. When, therefore, on a trial for perjury, alleged to have been committed by the defendant as a witness on a trial for felony before a Queen's counsel assisting the judges, and his notes of the evidence given on that occasion were tendered (on proof of his handwriting:)

Held, that such notes were not admissible.

THE defendant was indicted for perjury, alleged to have been committed by him as a witness on the trial of one Samuel Sawyer, at the Stafford Summer Assizes, 1850, on an indictment for cutting and wounding one Francis Dutton.

The indictment was as follows:—

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Staffordshire,) The jurors of our Lady the Queen, upon their
to wit. } oath present, that heretofore, to wit, at the assizes
and general session of the delivery of the gaol of our said Lady
the Queen for the county of Stafford, holden at Stafford in and for
the said county, on the twentieth day of July, in the year of our

Lord, 1850, before John Lord Campbell, Chief Justice of our said Lady the Queen, assigned to hold pleas before the Queen herself, and Sir Edward Vaughan Williams, Knight, one of the Justices of our said Lady the Queen, of her Court of Common Pleas, assigned to deliver the said gaol of the prisoners therein being, one Samuel Sawyer was in due form of law, and by a jury of the county in that behalf duly sworn and taken between our said Lady the Queen and the said Samuel Sawyer, tried upon a certain indictment then and there depending against him for having, on the tenth day of June, in the year of our Lord 1850, feloniously, unlawfully, and maliciously made an assault on one Francis Dutton, and for having feloniously, unlawfully, and maliciously wounded the said Francis Dutton, with intent to disable the said Francis Dutton, and also with intent to prevent the lawful detainer of a certain person then in the lawful custody of the said Francis Dutton, and which said person so in custody was to the jurors by whom the said indictment was presented,* and also with intent to do some grievous bodily harm to the said Francis Dutton, and that at the said trial so then and there had as aforesaid, Smith Child, late of the parish of Saint Mary, in Stafford, in the said county of Stafford, labourer, then and there appeared as a witness for and on behalf of the said Samuel Sawyer, and was then and there duly sworn, and took his corporal oath upon the Holy Gospel of God, before the said John Lord Campbell, and the said Sir Edward Vaughan Williams, Knight, so being such justices as aforesaid, to speak the truth, the whole truth, and nothing but the truth, of, upon, and concerning the matter then depending (they the said John Lord Campbell and Sir Edward Vaughan Williams, Knight, justices as aforesaid, then and there having sufficient authority to administer the said oath to the said Smith Child in that behalf.) And the jurors first aforesaid, upon their oath aforesaid, do say that the day on which the said offence for which the said Samuel Sawyer was indicted as aforesaid was committed was the tenth day of June, in the year of our Lord 1850, and the day on which the said Samuel Sawyer was committed for trial for the said offence for which he was so indicted as aforesaid was the ninth day of July, in the year of our Lord 1850; and the jurors first aforesaid, upon their oath aforesaid, do further present that at and upon the trial of the said indictment, it then and there became and was material whether the said Smith Child had seen one Samuel Cole on the said day on which the said Samuel Sawyer was committed for trial as aforesaid, and whether the said Smith Child accompanied the said Samuel Cole, on the day and year last aforesaid, from Hanley to Burslem, and whether the said Smith Child had, on the day and year last aforesaid, said to the said Samuel Cole that it was a bad job, and he the said Smith Child hoped that the said Samuel Cole would not be too hard with the said Samuel Sawyer, and whether

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* Sic.

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the said Francis Dutton, at the time the said offence was committed, fell, after he was struck by a stone, and whether the said Smith Child saw the said Francis Dutton kick a man to the jurors first aforesaid unknown, whom the said Francis Dutton then had in custody. And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said Smith Child, being so sworn as aforesaid, not having the fear of God before his eyes, nor regarding the laws of this realm, and wickedly contriving and intending that the said Samuel Sawyer should be unjustly acquitted of the said felony, did then and there, to wit, on the twentieth day of July, in the year of our Lord 1850, at the assizes and general session of the delivery of the gaol aforesaid, on the trial of the said indictment, upon his the said Smith Child's oath aforesaid, falsely, corruptly, knowingly, wilfully and maliciously, before the said jurors of the jury so sworn between our said Lady the Queen, and the said Samuel Sawyer as aforesaid, and before the said John Lord Campbell, and Sir Edward Vaughan Williams, Knight, justices as aforesaid, depose and swear (among other things, in substance and to the effect following, that is to say) I (meaning the said Smith Child) did not see Samuel Cole (meaning the said Samuel Cole) on the day of Sawyer's (meaning the said Samuel Sawyer's) commitment for trial (meaning on the said ninth day of July, in the year of our Lord 1850), I (meaning the said Smith Child) did not accompany Samuel Cole (meaning the said Samuel Cole) from Hanley to Burslem, on the ninth day of July (meaning the said ninth day of July, in the year of our Lord 1850), I (meaning the said Smith Child) did not say to Samuel Cole (meaning the said Samuel Cole), it is a bad job, and I (meaning the said Smith Child) hope you (meaning the said Samuel Cole) will not be too hard with Sawyer (meaning the said Samuel Sawyer), I (meaning the said Smith Child) never saw Samuel Cole (meaning the said Samuel Cole) until this week (meaning the week in which the said twentieth day of July, in the year of our Lord 1850 was); Francis Dutton (meaning the said Francis Dutton) did not fall after he was struck by a stone, at the time the offence was committed (meaning the offence for which the said Samuel Sawyer was indicted and tried as aforesaid), I (meaning the said Smith Child) was by the whole of the time (meaning the time of the committing of the offence by the said Samuel Sawyer as aforesaid), and Francis Dutton (meaning the said Francis Dutton), never fell at all. I (meaning the said Smith Child) saw Francis Dutton (meaning the said Francis Dutton) never fell at all.* I (meaning the said Smith Child) saw Francis Dutton (meaning the said Francis Dutton) kick a man (meaning the said person to the jurors first aforesaid unknown) he had in custody at the time (meaning the time of the committing of the said offence by the said Samuel Sawyer as aforesaid), several times on the ribs, whereas, in truth and in fact, the said Smith Child did see the said Samuel Cole on the said ninth day of July, 1850;

* Sic.

and whereas, in truth and in fact, the said Smith Child did accompany the said Samuel Cole from Hanley to Burslem on the said ninth day of July, in the year of our Lord 1850; and whereas, in truth and in fact, the said Smith Child did say to the said Samuel Cole, "It is a bad job, and I hope you will not be too hard with Sawyer" (meaning the said Samuel Sawyer); and whereas, in truth and in fact, the said Smith Child did see Samuel Cole before the said week in which the said twentieth day of July, in the year of our Lord 1850, was; and whereas, in truth and in fact, the said Francis Dutton did fall after he was struck by a stone, at the time the said offence was committed by the said Samuel Sawyer; and whereas, in truth and in fact, the said Smith Child did not see the said Francis Dutton kick any person at any time; and whereas, in truth and in fact, the said Francis Dutton did not kick any person he had in custody, at the time of the committing of the said offence by the said Samuel Sawyer as aforesaid, or any other time, as he the said Smith Child, at the time of his taking his said oath as aforesaid, well knew; and so the jurors first aforesaid, now here sworn, upon their oath aforesaid, do say that the said Smith Child, at the said assizes and general session of the delivery of the said gaol of our said Lady the Queen, holden at Stafford aforesaid, in and for the said county of Stafford, before the said John Lord Campbell, and Sir Edward Vaughan Williams, Knight, then being such justices as aforesaid (and then and there having sufficient and competent power and authority to administer the said oath to the said Smith Child), did, in manner and form aforesaid, commit wilful and corrupt perjury, against the peace of our Lady the Queen, her crown and dignity.

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The jury having been sworn,

P. Mc Mahon (for the defendant) objected to the sufficiency of the indictment. The allegation that the judges before whom the trial took place had authority to administer an oath, was defective. The indictment alleged that the defendant was sworn before Lord Campbell and Sir Edward Vaughan Williams, "then and there having *sufficient authority* to administer the said oath." This was not in compliance with the statute of 23 Geo. 2, c. 11, sect. 1. (b) That section rendered it necessary to set out the commission and other proceedings to show that the court had authority, but those formalities were dispensed with only on the condition precedent that it should be averred that the Court had "competent authority." These words were words of art for which no equivalent would be allowed, and "sufficient authority" was

(b) Which enacts "that in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken (averring such court or person or persons to have a competent authority to administer the same), together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceeding, either in law or in equity, other than as aforesaid, and without setting forth the commission or authority of the court or person or persons before whom the perjury was committed."

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obviously no equivalent for them. In every precedent the words "competent authority" were to be found.

Kettle (*contra*) contended that "sufficient authority" was equivalent to "competent authority."

HIS LORDSHIP said the objection deserved to be considered. He would not stop the case upon it, but would reserve it for the Court of Criminal Appeal, if necessary.

Mc Mahon next submitted that the indictment was defective with respect to the style of the court and the jurisdiction of the judges before whom the indictment against Sawyer was alleged to be tried, and that it did not show any authority in them to sit on his trial. The indictment alleged that that trial took place at the assizes and general session of the delivery of the gaol of our said Lady the Queen, for the county of Stafford, holden at Stafford, in and for the said county, before John Lord Campbell, chief justice of our said Lady the Queen, assigned to hold pleas before the Queen herself, and Sir Edward Vaughan Williams, Knight, one of the justices of our said Lady the Queen, of her Court of Common Pleas, assigned to deliver the gaol of the prisoners therein being. With respect to the court itself he need not observe that the assizes did not refer to the criminal jurisdiction of the judges, but to the former and now almost obsolete writs of assize. The court described in the indictment was, in fact, an impossible combination of civil and criminal jurisdiction.

HIS LORDSHIP said he would amend by striking out "assizes" as surplusage.

Mc Mahon next submitted that the indictment did not sufficiently show any jurisdiction in Lord Campbell and Mr. Justice Williams. In the commencement of the indictment they were described respectively, the one as "Lord Chief Justice of our Lady the Queen, assigned to hold pleas before the Queen herself," and the other as "one of the Justices of our Lady the Queen of her Court of Common Pleas assigned to deliver the said gaol," as if the pleader intended to contrast the one as "assigned to hold pleas before the Queen herself," and the other as assigned to deliver the gaol. There was no description of them as justices or commissioners assigned to deliver the gaol. The common form would be to add after the words "Common Pleas," "and others their fellows, justices assigned to deliver the said gaol," &c. But this was here omitted, and throughout the rest of the indictment their authority was stated and described only as "such justices as aforesaid," whereas it was manifest that merely as justices of the Queen's Bench and Common Pleas, they had no authority to try prisoners at Stafford.

Kettle submitted that his lordship would amend by inserting the common form of words which were accidentally omitted and were to be found in the office copy of the record of the conviction.

On its appearing that those words were in the record of the conviction,

HIS LORDSHIP said he would amend this defect as a variance.

The case then proceeded.

When the office copy of the trial and conviction of Sawyer was read, it appeared that it described the Court as a General Session of *Oyer and Terminer* and Gaol Delivery. It also described the charge against Sawyer as for *cutting* and wounding, and described the person whom he attempted to rescue as to the jurors "*unknown*," this last word having been omitted from the present indictment.

On objections being taken to these variances,

HIS LORDSHIP said he would amend them all.

In order to prove what passed on the trial of Sawyer, it was proposed to put the notes taken by Mr. Greaves in evidence, and his clerk was examined to the following effect:—

John Mc Bride.—I am clerk to Mr. Greaves, Q. C. I was present at the trial of Samuel Sawyer, at the last Summer Assizes, before Mr. Greaves. On that occasion the defendant was examined as a witness on behalf of Sawyer. The oath was administered by me. I produce Mr. Greaves's notes of the evidence on the trial. They are in his handwriting.

Cross-examined.—The trial took place in the Grand Jury Room. Mr. Greaves is a magistrate for Staffordshire.

It was then proposed to have the notes read as evidence.

Mc Mahon objected.

TALFOURD, J., inquired of the counsel for the prosecution how he proposed to make them evidence.

Kettle considered he had high authority for tendering them. They were a judge's notes, made at the time of the trial, and such notes were always acted on without calling the judge. Every day's experience showed that this was so in moving for a new trial. The inconvenience of bringing a judge as a witness, perhaps off his circuit, was an argument against the necessity of doing so.

TALFOURD, J.—A judge's notes stood in no other position than anybody else's notes. They could only be used in evidence to refresh the memory of the party taking them. It was, no doubt, unusual to produce the judge as a witness, and would be highly inconvenient to do so; but that did not make his notes evidence. Parties who chose to prosecute for perjury should take care to have some other proof of what was sworn than what might be found in a judge's notes. They were altogether inadmissible.

The notes were withdrawn, and other evidence given of what passed at the trial. At the close of the case for the prosecution,

Mc Mahon objected that the allegation of a trial before Lord Campbell and Mr. Justice Williams was not supported by proof of a trial before Mr. Greaves. Throughout the indictment they alone were named; Mr. Greaves was not once named, nor did the indictment leave it to be inferred that he might have acted with them, as it carefully departed from the common form, and avoided all allusion to "others their fellows," though these words appeared in the record of the conviction.

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Kettle contended that it was enough to name the chief commissioners, and referred to *R. v. Alford* (Leach. 150), where it was held that an indictment may allege the perjury to have been committed before one of the judges in the commission of assize, though the names of both appear in the record of the trial.

Mc Mahon replied.—In *R. v. Alford*, and every other case in the books except the late case of *Reg. v. Schlesinger* (2 Cox Crim. Cas. 170), the person before whom the trial in fact took place was named as the person or one of the persons before whom it did take place. In *R. v. Alford* the judge of assize who tried the case was named as the person before whom the perjury was committed, and the objection was, that on the production of the record of the trial, it appeared that the trial was alleged to have taken place before both the judges of assize named in the commission. The only exception to be found from the course of alleging the trial literally in accordance with the facts, was in *Reg. v. Schlesinger*, where, on an indictment for perjury, committed on a trial before the Secondary of London, the indictment alleged the trial to have taken place before the Sheriffs of London, and the Court of Queen's Bench held that that was sufficient, because from the ancient peculiar constitution of the City Courts, the Secondary had acted as assessor to the sheriffs, to them alone the writs were directed, and by them they were returned, and the Secondary had no authority of his own to try any cause. But the present case did not come within the principle of that decision, as here Mr. Greaves, if he had any authority, had just as much as any other commissioner; he was not the assessor of Lord Campbell and Mr. J. Williams; the trial might have been properly alleged to have taken place, and, so far as regarded that trial, his authority was co-ordinate with that of those two learned judges.

TALFOURD, J., said he thought the point of sufficient difficulty to be reserved for the Court of Appeal.

Kettle having then stated, in answer to an inquiry by *Mc Mahon*, that he was not prepared to produce the commission under which Mr. Greaves was authorized to sit—

Mc Mahon objected that there was no evidence whatever that Mr. Greaves had any authority to try Samuel Sawyer. Here Mr. Greaves was not named in the present indictment, or in the record of the conviction of Sawyer, and as the commission under which he was supposed to have acted was producible, possibly he might not be named in that. The proceeding, too, took place not in the public well-known Crown Court, but in a back room usually occupied by the grand jury, and in which the Judges of Assize, Oyer, and Terminer, and Gaol Delivery never sat. This trial might have been precisely similar to the trials which took place at Monmouth a few years ago, before Mr. Serjt. Allen, when the prisoners were obliged to be tried over again in consequence of his not being then named in the commission.

Kettle contended that the great inconvenience of forcing the Clerk of Assize to bring round the commissions with him was a

sufficient reason for the non-production of the commission in this case. The trial took place in a public court where criminal trials were frequently held at the assizes for this county, and it would be therefore presumed, according to the maxim *omnia rite acta*, that Mr. Greaves had the proper authority.

Mc Mahon.—As to the first point, an examined copy of the commission would be sufficient, and so the argument *ab inconvenienti* was to be met; and as to the other, one of the best known exceptions to the maxim of *omnia rite acta* was, that jurisdiction was not to be presumed.

TALFOURD, J., said that, if the trial had taken place in this court before a person in the robes of a judge of assize, and acting as a judge of assize, he would not require any proof of his authority, but Mr. Greaves sat in the grand jury room, and, being a magistrate for the county, might, it was just possible to suppose, have acted in that capacity. There was nothing on the face of any of the documents before the court to show that he had authority, he therefore thought the objection, though he would not stop the case upon it, was so formidable that he would, if necessary, reserve it for the Court of Appeal, and let the prisoner out on bail in the meantime.

The case then proceeded.

The defendant was acquitted.

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OXFORD CIRCUIT.

SALOP SPRING ASSIZES, 1851.

Shrewsbury, March 20.

(Before TALFOURD, J.)

REG. v. MORRIS. (a)

Night poaching—Indictment—Sufficiency of description of land—Name of occupier.

In an indictment for night poaching under the statute 9 Geo. 4, c. 69, s. 9, it is unnecessary to state whether the land was open or enclosed.

Where the land was described as in the occupation of Sarah Harriett Williams, and it was proved that she was generally known as "Mrs. Hosier Williams," or as "Sarah Harriett Hosier Williams:"—

Held that, as it appeared she would be as well known and identified by the name of Sarah Harriett Williams, and could not be mistaken for any other person, the description in the indictment was sufficient.

THE prisoner was indicted for night poaching.

The indictment alleged that Richard Morris, late of, &c., and certain other persons, being to the number of three and more

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

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together, on the 16th day of December, A.D. 1850, with force and arms, &c., at the parish aforesaid, in, &c., by night (that is to say), about the hour of two in the night, of the said 16th day of December, in the year aforesaid, unlawfully together did enter into and then and there were in certain land there situate, called Digmore Plantation, of and belonging to Sarah Harriett Williams, with the intent and for the purpose of then and there, by night, as aforesaid, illegally taking and destroying game, the said Richard Morris being then and there by night as aforesaid, and at the time when they so together entered and were in the said land as aforesaid, armed with a gun, against the form of the statute, &c. In a second count the land was described as Digmore Plantation, and in a third count, as "certain land in the occupation of Sarah Harriett Williams."

At the commencement of the trial,

Phillimore, for the defendant, objected that the indictment was defective in not stating whether the land was open or enclosed. The statute 9 Geo. 4, c. 69, s. 9, on which the indictment was framed, certainly made use of the terms, "any land whether open or enclosed," but he submitted that it was necessary to specify in the indictment whether the land was in fact open or enclosed, as an essential part of the description, but

TALFOURD, J., overruled the objection. (*b*)

In the course of the evidence for the prosecution, it appeared that the prosecutrix, who was described in the indictment by the name of Sarah Harriett Williams, was a widow generally known as Mrs. Hosier Williams, or Sarah Harriett Hosier Williams,—Hosier having been the name of a former husband.

Phillimore objected that this was a fatal variance between the evidence and the first and third counts. Where the land was described by the name of the occupier, that name was material as part of the necessary description. It was by that name alone the defendant was enabled to ascertain the land for entering which he was charged, and here the name of the occupier, as alleged in the indictment, was not the name by which she was commonly known.

Huddleston, for the prosecution, having been heard *contrà*,

TALFOURD, J., on ascertaining that Mrs. Williams would be quite as well known and identified by the name of Sarah Harriett Williams, and could not be mistaken for any other person, thought the description in the indictment sufficient.

The defendant was ultimately convicted.

(*b*) The point seems to have been already determined in *Reg. v. Andrews* (2 M. & Rob. 17), but that case was not referred to.—[J. E. D.]

COURT OF CRIMINAL APPEAL.

April 26, 1851.(Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J.,
PLATT, B., and TALFOURD, J.)

REG. v. MARY ANN BENNETT. (a)

Indictment for perjury—Averment of materiality—Certainty.

An indictment for perjury charged that the defendant, upon a trial for rape, falsely swore that she never got a Mr. M. W. (he the said M. W. being then present in court during the said trial) to write a letter for her; and that averment was prefaced by an allegation, that it was a material question whether she ever got one M. W. to write a letter for her. The evidence proved that, upon the trial for rape, Mr. M. W. was pointed out to her, and that she swore that she did not get him to write for her a letter which was produced and shown to her; and that that was false.

Held, that the allegation of materiality was sufficient; and the identity of M. W. sufficiently shown.

THE following case was reserved by Talfourd, J.:—Mary Ann Bennett was tried before me at the last assizes for the county of Gloucester, on an indictment charging her with wilful and corrupt perjury, committed on the trial at the Gloucester Spring Assizes, 1850, of Shadrach Lewis, and Isaac Hopkins, for a rape upon herself. The indictment against Mary Ann Bennett, after stating the trial, and the oath taken by the prisoner, as a witness, in the usual form, proceeded thus to allege the materiality of the matters assigned as perjury, and the prisoner's evidence, to which the assignments were applicable:—That upon the trial of the said indictment, the following questions became and were material, and each of them respectively became and was a material question, whether or not the said M. A. Bennett ever got one Milo Williams to write a letter for her, and whether or not she the said M. A. Bennett saw the said Milo Williams at the house of the father of the said prisoner, Shadrach Lewis, when the said letter was written, and whether or not she ever saw the said Milo Williams at the house of the said father of the prisoner, Shadrach Lewis, and whether or not she ever saw the said Milo Williams in any house, and whether or not she ever saw the said Milo Williams more than once, and whether or not the said Shadrach Lewis, and the said Isaac Hopkins, or either of them, violently, feloniously, and against the will of the said M. A.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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Bennett, ravished her. That the said Mary Ann Bennett being so sworn, &c., then and there, on the said trial, upon her oath aforesaid, falsely, corruptly and wilfully, &c., did depose and swear (amongst other things, in substance and to the effect following; that is to say) that she (meaning the said M. A. Bennett) never got a Mr. Milo Williams (he the said Milo Williams being then present in court during the said trial) to write a letter for her, and that she (meaning the said M. A. Bennett) did not see the said Mr. Milo Williams at the house of the father of the said prisoner, Shadrach Lewis, when the said letter was written, and that she (meaning the said M. A. Bennett) never saw the said Mr. Milo Williams at the said house of the said father of the said prisoner, Shadrach Lewis, and that she (meaning the said M. A. Bennett) never saw the said Milo Williams in any house, and that she (meaning the said M. A. Bennett) never saw the said Milo Williams more than once; and that the said Shadrach Lewis and Isaac Hopkins, violently, feloniously, and against the consent of the said M. A. Bennett, ravished her. The indictment then proceeded to negative the truth of the matters sworn in these terms:

Whereas in truth and in fact, the said Mary Ann Bennett did get the said Milo Williams to write a letter for her, &c., and concluded in the usual form. It was proved that, at the trial of Lewis and Hopkins, the prisoner, then the witness, was asked on her cross-examination, whether she ever got Mr. Milo Williams (who was pointed out to her in court) to write a letter for her? That she replied, "No, I did not." That a letter was then exhibited to her, and the question was repeated, as to "this letter," that she repeated her denial. She was then asked, did you not get Mr. Milo Williams to write this at Lewis's father's house? She said, "I did not." She was then asked if she ever saw Williams at Lewis's father's house? She said, "I never did." Again, whether she ever saw Williams? She replied, "once at Chepstow; never but once." She was then further asked, whether she ever saw Williams at her father's house. She replied, "Not in any house." The questions were afterwards in substance repeated to her by the judge, but she persisted in the same denials. She deposed to the perpetration of a rape upon her person by both prisoners in succession, each assisting the other. Upon the trial of the indictment for perjury, the letter in question, which had been given in evidence to contradict her on the trial for rape, was sworn by Milo Williams to have been written at the house of the father of Lewis, after the committal for rape, by himself, upon her suggestions, read over to her by him, signed by her with her mark, and by him taken away for transmission to Lewis in Gloucester Gaol. It was as follows:—

"St. Brinwalls Common, January 4, 1850.

"SHADRACH LEWIS.—Dear Friend,—Your master, Mr. Milo Williams, called to see your father about your unfortunate situation. I have told him I will do all I can to clear you, and I am

glad I was at your father's house when Mr. Williams called. I should not have went to the police about the matter at all if I had not been persuaded by Betty Wood and Nanny Voice. I had too many backers on, or I should not have troubled about it. If you are as willing as myself, when you return, I have no doubt all will be as well as it was before. Your father is well.

"I am, yours, &c., her

"MARY ANN X BENNETT."

"Witness, Milo Williams."

mark.

Other confirmatory proof of the truth of Mr. Williams's statement was given; and the jury found the prisoner guilty on all the assignments of perjury except on that assigned on the allegation that she never saw Williams but once (which there was no proof to negative), and the assignment on the allegation of rape itself, the sufficiency of which therefore it is not necessary to consider. For the prisoner, it was objected that the materiality of the matters assigned as perjury was not sufficiently alleged in the indictment. That the reference to the letter was too vague and general, and not properly pointed to the particular letter in question. That the reference to Milo Williams, and to Lewis's father's house were not properly introduced by an averment. That the letter produced in evidence was not sufficiently identified with the statements on the record to support them. It was also contended that the whole transaction of the letter was not sufficiently material to the charge of rape, but I thought it clearly was so under all the circumstances in proof before me, and I did not reserve this objection. I respited the judgment, and reserved the other objections for the opinion of the Court of Criminal Appeal.

Mc Mahon argued the case for the prisoner.

Powell contra.

LORD CAMPBELL, C. J.—I am of opinion that the conviction is right. It appears to me that the identity of Milo Williams is sustained throughout the indictment as the person who was present at the trial for rape, and the person who was present at the trial for rape is the person who gave evidence in support of this prosecution. So it is distinctly alleged that the question whether the prisoner did procure Milo Williams to write a letter for her was a material question; and that being so, it is unnecessary that the materiality should appear upon the face of the indictment. It is enough if the evidence shows it, as it was properly held to do in this case.

ALDERSON, B.—I was inclined at first to doubt whether the allegations as to her getting Milo Williams to write a letter for her were sufficient; but there is a positive averment that the question was material, and that being so, it is reduced to a question of evidence; and when we look at the evidence, the materiality of the letter becomes obvious enough. So, as to the identity of Williams, there appears some uncertainty at first; but

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in the statement of what she swore, the Milo Williams referred to is identified as being a person then present in court.

COLERIDGE, J.—I also, at one time, entertained some doubt in this case; and I still think that it would have been better if the identity of Williams had been distinctly averred in the introductory part of the indictment. I think, however, that the indictment may be sustained by reason of the subsequent averment of his presence in court, which has the effect of identifying the Milo Williams previously mentioned as the same person, with reference to whom the question was put; and that question is distinctly averred to have been a material question.

The other judges concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 3, 1851.

(Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J.,
PLATT, B., and TALFOURD, J.)

REG. v. ODDY. (a)

*Felonious receipt of stolen goods—Evidence of guilty knowledge—
Possession of other stolen goods.*

Upon a charge of feloniously receiving stolen goods, the possession of other stolen goods, not connected with the immediate charge, is not admissible as evidence of guilty knowledge.

THE following case was reserved by the Recorder of Leeds:—
The defendant was indicted for felony at the Leeds Borough Sessions, holden before the Recorder of that borough on the 3rd of April, 1851. The indictment contained three counts; the 1st count charged the defendant with breaking a warehouse, and stealing therefrom, on the 3rd of March, 1851, fifty yards of woollen cloth, value 10*l.*, the property of Isaac Boocock, in the said warehouse; the second count charged a simple larceny of the same property on the same day and year; the third count charged that the defendant, on the same day and year, feloniously received the same property, knowing it to have been stolen. To all these counts the defendant pleaded not guilty, and issue was joined on the part of the crown. At the trial, it was proved that

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

the cloth mentioned in the indictment had been stolen on the night between the 2nd and 3rd of March, 1851, from a mill, and was the property of the party named in that behalf in the indictment. It was further proved that the defendant was found in possession of it on the 10th of March, 1851, under circumstances which it was suggested showed an attempt to conceal the possession. It was further proved that the defendant, upon the cloth being discovered in his possession, declared that he had obtained the cloth from a woman who was called as a witness at the trial on the part of the prosecution, and who swore that it had not been obtained from her. The counsel for the prosecution proposed further to prove that the defendant's house had been searched within an hour after the property named in the indictment was found in his possession, and that upon this search two other pieces of cloth were found in the house; and also, that on the 13th of December, 1850, the defendant had been in possession of two more pieces of cloth, and that these four pieces of cloth had been stolen on the night between the 4th and 5th of December, 1850, from another mill, and were the property of different owners, no one of whom was connected with the owner of the cloth mentioned in the indictment. The counsel for the defendant objected to the reception of this evidence; first, on the ground that it was not receivable in support of either of the first two counts, and therefore could not be given unless those two counts were abandoned. Secondly, on the ground that, considering the evidence with reference only to the third count, it was not receivable, inasmuch as it did not appear and was not suggested that any of the four pieces of cloth were delivered to the defendant, or stolen by the person who delivered to the defendant or stole the cloth mentioned in the indictment, and that it did appear that two of the four pieces had not been received by the defendant at the same time, or stolen at the same time, or from the same person, as the cloth mentioned in the indictment; and that it did not appear when the other two pieces were received by the defendant, but did appear that they were not stolen at the same time or from the same person with the cloth mentioned in the indictment. The Recorder received the disputed evidence without requiring an abandonment of either of the first two counts, and, in summing up, told the jury not to apply it to either of the first two counts; but he told them that it was evidence of guilty knowledge under the third count, without desiring them not to take it into consideration unless they believed that the four ends of cloth, or some or one of them, were or was delivered to the defendant, or stolen by the person who delivered to the defendant, or stole the cloth mentioned in the indictment, or that any of the four pieces of cloth was delivered to the defendant at the same time, or stolen from the same person, with the cloth mentioned in the indictment. The jury found the defendant not guilty on the 1st count, not guilty on the 2nd count, guilty on the 3rd count. The defendant was sentenced to be transported for seven years; but execution of the judgment

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was respited, and the defendant committed to prison until the questions hereafter mentioned should have been considered and decided. The defendant is still in prison. The questions for the opinion of the justices of either bench, and Barons of the Exchequer, are, whether, under the circumstances above-mentioned, first, the disputed evidence was receivable; secondly, the direction to the jury correct.

Pickering, in support of the conviction.—The evidence was properly received in this case, and the jury properly directed. No case precisely similar to the present has occurred; but there are cases in which evidence of the possession of other stolen goods has been received upon a similar charge: (*R. v. Dunn*, Moo. C. C. 146; *R. v. Davis*, 6 Car. & P. 177; *R. v. Mansfield*, Car. & M. 140.) (b) [ALDERSON, B.—Upon a charge involving an intent to steal, can you prove a previous conviction for felony?] Evidence of general bad character is certainly not admissible. [ALDERSON, B.—This is particular evidence of bad character.] It is only the allegation of *scienter* in the indictment which renders it admissible. [LORD CAMPBELL, C. J.—How does the previous receipt of stolen goods

(b) The following is the summary of the three cases cited, given in Russell on Crimes (Greaves' Ed.):—*R. v. Dunn*:—Upon an indictment for receiving stolen goods evidence may be given of different receipts of goods stolen from the same person, in order to show guilty knowledge in the receiving at least of such receipts as were prior to the one charged in the indictment; but where, on an indictment for receiving several articles, it appears that they were received at different times, the prosecutor must elect on which receipt he will proceed. Upon an indictment against a principal and receiver, the evidence against the receiver was, that many of the goods were found in her possession; others pledged by herself; and others by her direction, with different pawnbrokers, at different times, for a period of between four and five months; and other parcels were proved to have come into her possession at several and distinct times, and she admitted that all these things had been given to her by the principal; and it was submitted that the prosecutor should elect what articles he meant to rely upon, and Gaselee, J., decided that as there was evidence that some of the things came at different times there were several distinct acts of receiving, and that the prosecutor must elect what act of receiving he relied upon to support the felonious receiving. The prosecutor then elected to go upon the receiving of two particular pieces of silk. It was then objected that evidence ought not to be allowed of the receiver having pledged or disposed of, or having in her possession the other articles of stolen property, in order to raise an inference of guilty knowledge; but as all the property had been stolen from the same persons, and had been all brought to her by the principal, Gaselee, J., thought it was admissible and proper to be left to the jury, as an ingredient to make out the guilty knowledge; and he told the jury that they might take into their consideration the circumstances of her having the various articles of stolen property in her possession, and pledging or otherwise disposing of them at various times, as an ingredient in coming to a determination whether when she received the two pieces of silk she knew them or either of them to have been stolen. The jury found the prisoner guilty; and, upon a case reserved, the judges were unanimously of opinion that evidence of other acts of receiving was properly admitted against the receiver, and the conviction was therefore right. *R. v. Davis*:—Where upon an indictment for receiving stolen goods, it was proposed to prove other receipts of stolen articles besides those laid in the indictment, Gurney, B., held that any receipts that were laid before those laid in the indictment were evidence, and that, strictly speaking, the receiving another article, the subject of another indictment, was admissible. In the same case it was held that evidence might be given not only of the finding of the goods mentioned in the indictment in the house of the prisoner, but also of the finding of many other goods marked with the mark of the prosecutor, with a view to the *scienter*. *R. v. Mansfield*:—Upon an indictment for receiving stolen tin, it was held that evidence might be given that when the constable went to search the prisoner's warehouse for stolen iron he saw the prisoner endeavouring to conceal some brass in some sand, and that after he was taken away in custody, his wife carried some tin under her cloak from a warehouse on the premises. In the same case it was held that what the prisoner said to the constable, not only relating to the tin which was stolen, and for which the constable was not searching, but also relating to the iron for which he was searching, was admissible in evidence.

help to prove the *scienter* alleged in this indictment?] [ALDERSON, B.—My brother Talfourd and I rejected similar evidence in *Sirrell's case*.] Coleridge, J., received it in *R. v. Mansfield*. [COLERIDGE, J.—It was impossible to reject the evidence which I received there. I could not prevent the witness from giving the account of what he found.] There is no difference in principle between this case and that of uttering forged notes, where evidence of previous utterings is always received to prove the guilty knowledge; and the moral weight of such evidence is almost irresistible. The possession of a thousand stolen articles would afford almost conclusive evidence of guilty knowledge. [LORD CAMPBELL, C. J.—The moral weight of the evidence is not the test. Many facts are excluded by law, which might be important, on account of the inconvenience of admitting them.] The inconvenience ought not to weigh against the conclusiveness of the evidence; but the inconvenience supposed would not really arise. The prisoner would not, in fact, be taken by surprise, and the inconvenience of raising different issues is submitted to in many cases, for the sake of furthering the ends of justice: (*Whiley's case*, (c) 2 Leach, 983; 1 New Rep. 92.) [ALDERSON, B.—But here one robbery was in March, and the other in the December previous. Can you mention any case where evidence has been admitted of a transaction which took place three months before the time to which the indictment relates?] In *Ball's case*, (d) (R. & R. 132), the former uttering, of which evidence was given to show a guilty knowledge, took place about three months before the offence charged in the indictment. But it is submitted that the interval of time which may have elapsed between the previous offence which it is attempted to prove and the one charged cannot affect the question. That observation may go to the effect of the evidence, but not to its admissibility. In *Whiley's case* (2 Leach, 983), Lord Ellen-

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(c) That was an indictment for uttering a forged bank note in March, 1804; and to prove the guilty knowledge, former utterings, one on the 13th February, 1804, another on the 25th February, 1804, and another on 28th February, were offered in evidence. All the arguments from the inconvenience of admitting such evidence were urged, and were thus dealt with by Lord Ellenborough: "The observations respecting prisoners being taken by surprise, and coming unprepared to answer or defend themselves against extrinsic facts, is not correct. The indictment alleges that the prisoner uttered this note knowing it to be forged, and they must know that without the reception of other evidence than that which the mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether they uttered it with a guilty knowledge of its having been forged, or whether it was uttered under circumstances which showed their minds to be free from that guilt."

(d) *Ball's case*.—The prisoner was indicted for uttering a forged Bank of England note, knowing the same to be forged. Clear proof was adduced that the note in question was forged, and that it had been uttered by the prisoner at East Bourn, on the 17th June, 1807. To establish his guilty knowledge, evidence was admitted that on the 20th March preceding, he had passed off a 10*l*. Bank of England note, likewise forged, and of the same manufacture, and that there had been paid into the Bank of England various forged notes, dated between December, 1806, and March, 1807, all of the same manufacture, and having different indorsements upon them in the handwriting of the prisoner. It likewise appeared, that when he was apprehended he had in his possession paper and implements fit for making notes of the same kind with those produced. The prisoner was found guilty, but the opinion of the judges was taken upon the admissibility of the evidence. They held it admissible to prove the knowledge of the prisoner that the note was forged, and that everything which he said or did was proper to be admitted, to show his knowledge of the forgery.

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borough thus deals with that observation: "True it is, that the more detached the previous utterings are in point of time, the less relation they will bear to the particular uttering stated in the indictment; and when they are so distant, the only question that can be made is, whether they are sufficient to warrant the jury in making any inferences from them as to the guilty knowledge of the prisoners; but it would not render the evidence inadmissible. Circumstances of this kind may produce such strong evidence as to leave no doubt as to the prisoner's knowledge that the notes were forged." The admissibility of such evidence, too, is not confined to previous utterings of the coin of the realm, or of Bank of England notes, or of notes belonging to the same bank. Evidence has been adduced of a previous uttering of a note of one private bank, in order to show a guilty knowledge at the time of uttering a note of another private bank: (*Kirkwood's case*, Lewin C. C. 103. (e) So in *Ball's case* (1 M. C. C. 470), in order to show that the prisoner uttered a Polish note with a guilty knowledge, evidence was given, not that he had previously uttered any other Polish note, or any other note at all, but that he had previously agreed to make and to deliver to a person some forged Austrian notes, which were never in fact made.

R. v. Hough (Russ. & Ry. 120), (f) asserts the same principle, and it is applicable here. Even upon a trial for murder, evidence of a previous murder connected with the murder charged has been received for the purpose of proving motive: (*R. v. Clewes*, 4 Car.

(e) The indictment was for uttering a 5*l.* note of the Bank of Ireland; and two forged notes of Messrs. Ball and Co., bankers, Dublin, were received for the purpose of showing guilty knowledge.

(f) The indictment was for forging and uttering a bill of exchange, purporting to be drawn on a certain banking house; and other forged bills upon the same house, found upon the prisoner when he was apprehended, were received as evidence of guilty knowledge.

(g) *R. v. Clewes*:—Upon an indictment for the murder of one Hemmings, it was opined that great enmity subsisted between Parker, the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and had said he would give 50*l.* to have him shot; and that the rector was shot by Hemmings; and that the persons who had employed him, fearing they should be discovered as having hired him to murder the rector, had themselves murdered Hemmings; and that Hemmings' bones had been found in a barn occupied by the prisoner at the time of the murders. After evidence had been given of declarations of the prisoner, showing that he entertained malice against the rector, it was proposed to show that Hemmings was the person by whom the rector was murdered; it was objected that this was not admissible, as the rector's death was not the subject of the present inquiry. LITTLEDALE, J.—"I think that I must receive the evidence. On the part of the prosecution it is put thus; that the prisoner and others employed Hemmings to murder Mr. Parker, and that he being detected, the prisoner and others then murdered Hemmings to prevent a discovery of their own guilt; now to ascertain whether or not that was so in point of fact, it is necessary that I should receive evidence respecting the murder of Mr. Parker."

(h) *R. v. Vokes*:—The prisoner was charged with shooting at a gamekeeper; and there was evidence that he had fired twice. Between the first and second firing was about a quarter of an hour. In the course of the trial it was suggested that the prosecutor ought not to give evidence of two distinct felonies; but the learned judge thought it unavoidable in this case, as it seemed to him one continued transaction, in the prosecution of the general malicious intent of the prisoner. Upon another ground also the learned judge thought the evidence proper. The counsel for the prisoner, by his cross-examination of the gamekeeper, had endeavoured to show that the gun might have gone off the first time by accident; and although the learned judge was satisfied that this was not the case, he thought the second firing was evidence to show that the first, which had preceded it only a quarter of an hour, was wilful; and to remove the doubt, if any existed, in the minds of the jury. Upon a case reserved, the judges held the evidence rightly received, and the prisoner properly convicted.

& P. 221 (g); *R. v. Vohe*, Russ. & Ry. 531 (h).) [LORD CAMPBELL, C. J.—What you want is a case in which evidence of a previous offence, unconnected with the one charged, has been received.] Where is the line to be drawn? It will be very difficult to lay down any rule as to the interval of time or degree of connexion which are necessary in order to render evidence of this sort admissible. In *Gibson v. Hunter* (2 H. BL 288), irregular and suspicious transactions between A. and B. in relation to other bills were received as evidence to show with respect to a particular bill drawn by A. upon B., and payable to a fictitious payee, either that B. knew the name of the payee to be fictitious when he accepted it, or had given A. authority to draw it.

No counsel appeared for the prisoner.

LORD CAMPBELL, C. J.—I am of opinion that the evidence was as little receivable under the 3rd count for receiving as upon the 1st or 2nd counts for stealing. It would be evidence to prove that the prisoner is a very bad man, and likely to commit such an offence; but by the law of England one offence is not allowed to be given in evidence to prove another. How can the possession of other stolen goods show any knowledge that the particular goods mentioned in the indictment were stolen? It can lead to no such conclusion. With regard to the admission in evidence of proof of previous utterings upon indictments for uttering forged notes, I have always thought that those decisions go a great way, and I am by no means inclined to apply them to the criminal law generally; but certainly evidence of that description shows the prisoner skilful in dealing with forged paper; and that may lead to the inference that he knew the particular notes to be forged; but there is no ground upon which, from evidence like this, the *scienter* can be inferred upon a charge of feloniously receiving stolen goods. A similar point was properly decided by my brothers Alderson and Talfourd, in *Sirrell's case*, at Liverpool; and I think this evidence was improperly admitted, and that the conviction must be quashed.

ALDERSON, B.—In the cases of uttering, the act received in evidence is of the same nature as that which it is to explain; but the evidence which is offered to prove a guilty knowledge on this occasion is quite consistent with the supposition that on the former occasions the prisoner himself stole the goods. Here the prisoner is found not to have stolen, but to have received, the goods.

The other judges concurring,

Conviction reversed.

REG.
v.
ODDY.
1851.

Receiving—
Evidence.

Judgment.

CENTRAL CRIMINAL COURT.

NOVEMBER SESSION, 1850.

(Before ALDERSON, B., and MARTIN, B.)

November 27.

R. v. MACKLIN. (a)

7 & 8 Geo. 4, c. 29, s. 57—Order for the restitution of stolen goods—
Writ of restitution—Counsel—Practice.

Where a prisoner pleaded guilty to several indictments charging him with larceny, and an application was made on the part of the prosecutor for an order for restitution, the court consented to hear counsel on behalf of those who were in possession of the goods, and against whom the order, if made, would operate.

Where, under such circumstances, the depositions taken before the magistrate disclosed a clear case of felony, the court declined to order a writ of restitution to issue on the suggestion of the holders of the goods that the prisoner was an agent, and therefore that the fraudulent dealing with the goods on his part did not constitute a felony, but they made the common order for restitution.

THE prisoner was arraigned on several indictments, which charged him with stealing a large amount of property. To all these indictments he pleaded guilty.

Clarkson (with whom was Huddleston), for the prosecution, applied to the court for an order, under the 7 & 8 Geo. 4, c. 29, s. 57, upon several pawnbrokers, with whom the goods had been pledged, that they should be given up to the prosecutor.

Parry, who appeared for one of the pawnbrokers, claimed to be heard on his behalf.

Clarkson objected that the pawnbroker was not a party before the court, and could not, therefore, be heard by counsel; he had no *locus standi*.

ALDERSON, B.—I do not think I ought to object to hear what the pawnbrokers have to say against this application, and if I ought to hear them, I do not see why I should not hear their counsel.

Parry then submitted that great injustice would be done if this order was made. There was a very large amount of property in the hands of the pawnbrokers, and, because the prisoner had chosen to plead guilty, they were to be deprived in this summary manner of what, upon investigation, it might appear they were

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

legally entitled to. The act of the prisoner in pleading guilty ought not to affect third parties. It might be that he was guilty upon one charge, and, knowing that he must be convicted, might hope to do himself service with the prosecutor by confessing his guilt as to all. There was no proof that the property ever belonged to the prosecutor; but, merely because he chose to include it in several indictments, he came to the court and asked the judges, without further inquiry, to order it to be given up to him. [ALDERSON, B.—No doubt the identity of the property must be established; but I do not think we have any other matter to consider.] If the case had been tried it might have been shown that the prisoner was the agent of the prosecutor, and that he pledged these goods under circumstances that would not constitute a felony. [ALDERSON, B.—But surely now I must take it upon the prisoner's confession that he was a thief and not an agent.] This presumption did not exist as against third parties. It was quite possible to conceive that a confession of this kind might be obtained by collusion. Under such circumstances, those who had taken the property fairly, and in the ordinary course of business, ought not to be precluded from showing that, in spite of the confession, no felony had been committed. The court had a discretion in the matter, and would not exercise it in favour of the prosecutor, except upon the clearest proof that he was entitled to the goods. [ALDERSON, B.—What course do you wish us to pursue?] To order a writ of restitution to issue, then the whole matter could be inquired into.

ALDERSON, B.—I do not see at the moment how any good could accrue to your clients from such a course. I certainly think the pawnbrokers should not be absolutely bound by the prisoner's confession. It ought not to affect them; but, on the other hand, the act of Parliament prescribes that where the person robbed has prosecuted the thief to conviction, he shall have an order from the court that his goods be restored to him. Would not the better course be to bring the goods into court that they may be identified, and that affidavits should be made on both sides, of any matters the parties may think it necessary to state? We should then have an opportunity of forming our judgment upon the facts, of which at present we are entirely ignorant.

Clarkson.—No doubt we must establish to your Lordships' satisfaction that the goods are the goods of the prosecutor; but, as to any suggestion that this is not a felony, a glance at the depositions will satisfy you that there is no ground for it.

ALDERSON, B.—But even then the statement in the depositions would not be conclusive against third persons. At all events, I must read the depositions for the purpose of deciding as to what sentence should be passed upon the prisoner, and I will, therefore, give an answer to your application to-morrow.

November 28.

ALDERSON, B.—The only point on which my brother Martin

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stolen goods—
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*Restitution of
stolen goods—
Practice.*

and myself have felt any doubt, is as to whether a summary order should be made, or a writ of restitution ordered to issue. I have looked into the law on the subject of the writ of restitution, of which in my experience I never knew an instance. In fact, the only case I can find is *Burgess v. Coney* (1 Tremaine's Pleas of the Crown, 315), which, although a civil case, was tried here at the Old Bailey. No doubt the court may award such a writ, but I see no necessity for it in this case. We have looked over the depositions, and are satisfied that this is not a case within the Factory Act, that the prisoner was not an agent, and that in making away with this property, he was clearly guilty of felony. We shall therefore make the common order for restitution, subject, of course, to the identity of the goods being established, but with respect to which probably no difficulty will arise.

MARTIN, B., concurred.

Application for an order of restitution granted.

Clarkson and Huddleston in support of the application.

Parry against it.

CENTRAL CRIMINAL COURT.

NOVEMBER SESSION, 1850.

November 28.

(Before the RECORDER.)

REG. v. COURTENAY. (a)

Housebreaking—Ownership of dwelling-house.

A. was in the service of B. and lived in a house close to B.'s place of business. B. did not live in the house himself, but he paid the rent and taxes. A. paid nothing for his occupation. Part of the house was used as storerooms for B.'s goods.

Held, that this was the dwelling-house of B. and was improperly described in the indictment as the dwelling-house of A.

THE prisoner was indicted for feloniously breaking and entering the dwelling-house of Edward Jones, and stealing 144 metal taps. It appeared that Jones, the prosecutor, was in the service of a Mr. Doulton, who was the landlord of the premises in question. Part of the house was used as store rooms for Mr. Doulton's

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

goods, and in the other part the prosecutor resided; no one else ever resided there. Mr. Doulton paid the rent and taxes, and nothing was paid by the prosecutor for his occupation, either by way of deduction from his wages or otherwise.

Ribton (for the prisoner) contended that under such circumstances the house was not the dwelling-house of Jones. He was a mere servant, and occupied as such, and had no possession distinct from that of his master. [THE RECORDER.—*Wills's case* (1 Moo. C. C. 248), very much resembles this case in the facts, and there the house was held to be properly described as that of the servant.] But there the prosecutor was something more than a servant; he was the secretary of a company and lived in the house with his family. The true test seems to be this: Who pays the rent? Can the master distrain? (*R. v. Jarvis*, 1 Moo. C. C. 7.) Does the servant occupy in his own right or in that of the master? Clearly in this case in right of the latter.

O'Brien (for the prosecution) contended that the object of the statute was to protect the persons living in the house, and those who were in the habit of so doing might be alleged to be the proprietors of the dwelling-house. The circumstance of another person paying the rent could not affect the question as to who dwelt in the house.

Ribton.—No doubt all who live in the house should be protected. A servant will be so to the same extent as the master, but the only question here is how, under such circumstances, the house should be described.

THE RECORDER (after consulting ALDERSON, B.)—The learned Baron, whose opinion I have asked, seems to think that this house should be described as the house of the master, and although I am not free from doubt upon the subject, I shall act on his opinion and decide that this is an improper description.

Judgment in favour of the prisoner as to the charge of housebreaking.

O'Brien for the prosecution.

Ribton for the prisoner.

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v.
COURTENAY.
—
1850.
—
Housebreaking
—*Indictment.*

COURT OF CRIMINAL APPEAL.

(Before JERVIS, C. J., PATTESON, J., CRESSWELL, J., ERLE, J.,
and MARTIN, B.)

January 18, 1851.

REG. v. DAWSON. (a)

Forgery—Warrant or order for payment of money.

A. B. owed money to C. D., and the prisoner forged and delivered to A. B. a letter purporting to be written by C. D. in the following terms: "A. B., London. Bought of C. D., English and Foreign fruit merchant and potato salesman, two bushels of apples, 9s. Sir, —I hope you will excuse me for sending for such a trifle, but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock there will be an action commenced against me, and I am obliged to hunt after every shilling. Yours, &c. C. D."

Held, that the document was a warrant for the payment of money within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 3.

Semle, per Erle, J., and Cresswell, J., it was also an order for the payment of money.

Case.

THE following case was reserved by Mr. Baron Martin:—At the session of goal delivery, holden for the jurisdiction of the Central Criminal Court, in November last, Frederick Augustus Dawson was tried before me upon an indictment founded on the statute 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, charging him with forging and uttering the document hereinafter set forth (and which was described in some counts as an order and in others as a warrant for the payment of nine shillings), with intent to defraud John Lowe. The forged document was in the following form:—

Mr. Lowe, London.

Bought of C. Dawson, English and Foreign fruit merchant, and potatoe salesman, two bushels of apples, 9s.

Nov. 9.

SIR,—I hope you will excuse me sending for such a trifle, but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock there will be an action commenced against me, and I am obliged to hunt after every shilling.

Yours, &c.,

F. DAWSON.

It appeared upon the trial that Mr. John Lowe, to whom the

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

document was directed, was indebted to Mrs. Frances Dawson, by whom it purported to be signed (and who carried on business in the name of C. Dawson) in the sum of nine shillings, for two bushels of apples, that the document was forged and uttered by the prisoner to Mr. Lowe as a genuine instrument coming from Mrs. Dawson with the intention of fraudulently obtaining from Mr. Lowe the said sum of nine shillings. The facts necessary to establish the case were clear, but it was objected on the part of the defendant that the document was neither an order nor a warrant within the meaning of the above section of the said statute. I directed the jury to consider whether the prisoner was guilty of forging and uttering the document with the fraudulent intention of obtaining from Mr. Lowe the sum of 9s., and appropriating it to himself. The jury thereupon found the prisoner guilty. But doubting whether such document was an order or a warrant within the above section, I respited judgment upon the indictment and remanded the prisoner to the gaol of Newgate until and in order that I should have the opinion of Her Majesty's justices and barons under the act of 11 & 12 Vict. c. 78, upon a case to be stated, whether the document in question was, under the circumstances, such an order or warrant, and I request the opinion of the said justices and barons upon the foregoing case.

December 7, 1850.

SAMUEL MARTIN.

Ribton (for the prisoner) contended that the document was neither a warrant nor an order. It could not be an order, because in such a case the person ordering must have had authority to do so, and the person to whom the order was directed must have been compellable to pay.

CRESSWELL J.—Here the money was due, and therefore the orderee might be compelled to pay.

PATTESON, J.—Suppose it had been a genuine instrument, might not the orderee have insisted on payment?

Ribton.—No: not at the time and under the circumstances in which it was demanded.

ERLE, J.—Would not such a document be a defence if he had been afterwards sued for the money? If so, it is surely a warrant to pay. How would it have been a better warrant, supposing that at the bottom of it had been written, "I hereby warrant your paying the above sum?"

Ribton.—The distinction with respect to a warrant, no doubt is, that the party drawing has authority to draw, but the person on whom it is drawn is not obliged to pay. (*R. v. Vivian*, 1 C. & K. 721.)

PATTESON J.—In *Thorne's case* (2 Moo. C. C. 210), it was decided that it is not even necessary that there should be funds in the hands of the drawee.

JERVIS, C. J.—In *R. v. Vivian* it was optional whether or not the person to whom the document was addressed should pay it. Here the application is to the debtor, who was bound to pay.

Ribton.—There is nothing to show on the face of this instrument that any money was paid, so as to render it available as a defence

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to a subsequent action for the money. Warrant is a word of technical and commercial meaning, and was never intended by the Legislature to apply to such an instrument as this.

JERVIS, C. J.—If this had been a genuine instrument, and Mr. Lowe had paid to the bearer of it 9s., and the following day Mrs. Dawson had asked for the money, he would have been quite justified in refusing to pay it. I am clearly of opinion, therefore, that it is a warrant for the payment of money.

ERLE, J.—And I think it is an order also.

CRESSWELL, J.—Surely it is impossible to raise any doubt about this being a warrant, as well as an order.

The rest of the court concurred.

Conviction affirmed.

Ribton for the defence.

COURT OF CRIMINAL APPEAL.

(Before JERVIS, C. J.; PATTESON, J.; CRESSWELL, J.;
ERLE, J.; and MARTIN, B.)

January 18, 1851.

REG. v. AMOS. (*a*)

Arson—Description of building—Shed.

A., being possessed of freehold land, employed capital in building houses upon it. At the time in question, twenty or thirty houses were in course of erection, A. providing the materials and personally superintending the work, which was performed by persons sometimes under contracts with him, and sometimes directly employed by him. His object was to dispose of the houses when he could find purchasers. The building alleged to have been destroyed was erected by him four or five years before, for the convenience of his works. It was twenty-four or twenty-five feet square, its sides being of wood, with glass windows, and the roof was slated. It was commonly called a workshop. It was used as a storehouse for seasoned timber, as a place of deposit for tools, and sometimes timber was worked up in it and prepared for use. At the time of the fire it contained a quantity of timber so prepared. Held, that the building was properly described in the indictment as a shed. Semble, per Patteson, J., it was properly described also as a building used for carrying on the trade of a builder.

THE following case was reserved for the opinion of the Court by Justice Talfourd:—

The prisoner was tried before me at the last session of the

(*a*) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

Central Criminal Court, for arson. The building which he was charged with burning, was described in one count of the indictment as a "warehouse," in the second as "an office," in the third as a "shop," in the fourth as a "shed," and in the fifth as "a building used for carrying on a certain trade, that is to say, the trade of a builder."

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Indictment—
Description of
building.

The building destroyed by fire stood on premises belonging to a gentleman who had been in the army, and was styled "Captain Ross," at Clapham, possessing a considerable freehold estate there: he employed his capital in building houses thereupon, of which from twenty to thirty were in the course of erection, himself providing the materials and superintending the work, which was performed by persons sometimes under contracts with him, and sometimes directly employed by him, but always with his own materials. His object was to let the premises, or sell and convey them as he could find purchasers.

The building was erected by him four or five years ago, for the convenience of the works; it was twenty-four or twenty-five feet square, its sides of wood, with glass windows, its roof slated, and it was commonly called "the workshop;" it was used as a storehouse for seasoned timber, as a place of deposit of tools, and a place where timber was worked up into proper forms, and prepared for use. At the time of the fire, this building contained timber prepared for use, which, being burnt with it, made the owner's loss amount to more than 1,000*l*. On the part of the prisoner, it was contended that the building destroyed did not answer either of the descriptions of "warehouse," "office," "shop," or "shed," and that the use of it by Captain Ross was not a use in the trade of a builder. The jury found the prisoner guilty, and in answer to a question put by me to them, found that Captain Ross had been, and was at the time of the fire, in the habit of employing his capital in the building of houses on his own land, and of purchasing and working up timber and other materials in their erection, for his profit and gain, and that the building destroyed was, at the time of the fire, employed by him for the purposes of such object. I respited the judgment, and reserved the question, whether the building destroyed answers the description in either count of the indictment, for the opinion of the judges of the Court of Criminal Appeal.

Case.

16 June, 1851.

J. N. TALFOURD.

Pulling (for the prisoner.)—None of the counts are sufficient to include the building which has been burnt. It is submitted that the answer of the jury to the question put to them by the judge must be struck out of the case. They had already given their verdict, and no explanation of it afterwards could be admitted. [JERVIS, C. J.—We must surely take the case as it is submitted to us. ERLE, J.—The verdict is not complete until it is accepted by the judge.] Then, taking the case as it stands, it does not appear from the facts that the prosecutor carried on the trade or business of a builder. He neither bought nor sold buildings. He had considerable landed property, and built houses as any other

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capitalist might do, but not for the purposes of trade. Buying land for the purposes of building houses upon it does not constitute a man a trader: (*Stuart v. Sloper*, 18 L. J. 321, Ex.) [JERVIS, C. J.—That is a very different case from this. There Mr. Stuart bought land, and employed builders to build houses for him; here Captain Ross is his own builder.] It is true that Captain Ross was willing to sell if he could find purchasers; but it does not appear that he had, in fact, ever sold. In the case referred to, Stuart had taken land from the beginning, for the purpose of trading in the houses that should be built upon it. [CRESSWELL, J.—But building upon land and allowing it to be built upon are two different things. ERLE, J.—You seem to think that because a man would not be considered a trader within the meaning of the bankrupt laws, that he is therefore not within the protection of this statute.] There is no difference, I submit, between a trader in the one sense and in the other. The object of the Legislature was to protect trade; and we must, therefore, look strictly to what trade is. [ERLE, J.—You mean to say that the Legislature meant to leave the buildings and sheds of private gentlemen to be set fire to with impunity?] Again, this is not a warehouse. Dr. Johnson, in his dictionary, defines a warehouse to be a “storehouse for merchandise,” thus connecting the word with the purposes of trade. In Richardson’s Dictionary the same definition is given. In *Godfrey’s case* (1 Leach, 322), which was a charge of stealing from a warehouse, this meaning seems to have been put upon the word. In *R. v. Hill* (2 Moo. & Rob. 458), a cellar in which goods were deposited was held to be a warehouse; but there they were deposited for sale. [JERVIS, C. J.—What do you understand by the word merchandise?] Whatever is bought and sold by merchants. Wares are goods that are sold in markets. A warehouse is not simply a storehouse; it is a storehouse for merchandise; for that which is to be sold. [JERVIS, C. J.—Then you would say that cotton stored at Liverpool for sale is in a warehouse; but when it gets to Manchester, to be manufactured, it ceases to be merchandise, and the building in which it is kept is not a warehouse. But what do you say to this building being called a shed?] That word is used in the act of Parliament to mean some erection connected with farming; that is shown from its connexion with “hovel, fold, or any farm building.” [CRESSWELL, J.—It does not say to any *other* farm buildings.] No, but farm buildings are especially referred to after the specific words. Dr. Johnson defines a shed to be a shelter made of boards, &c. *R. v. Munson* (2 Cox Crim. Cas. 186) is in point. A shed is a place open at the sides. It means, a refuge, a shelter from a storm; it must be open to be thus available. [JERVIS, C. J.—It will very much assist us in this investigation if you will tell us what this building really is.] The act of Parliament is to be construed strictly, and the only question is, whether the building can be declared to be what the statute alleges? Another description is that of a “shop.” *R. v. Sanders* (9 C. & P. 79) shows that this will not do. It was

there decided that the building must be used for the sale of goods. It was not sufficient that it was used as a workshop. The term "office" is equally objectionable. In point of fact, it never was used as an office.

Garde (for the prosecution) was not called upon.

JERVIS, C. J.—It is not necessary that we should express our opinion upon each count of the indictment. It is enough if any one count can be supported. I shall therefore abstain from giving any judgment upon the general facts of the case. I think that this building is properly described as a shed under the 7 & 8 Vict. c. 62, s. 1. It has been said that this description is confined to farm buildings; but I think it has a more extensive signification, and I hold, therefore, that the conviction was right.

PARTESON, J.—I think this building is certainly a shed. It was built for the purpose of stowing away materials to be used for building purposes. I am also rather inclined to think that it is a building used for building purposes; but this it is not necessary to determine.

CRESSWELL, J.—I have no doubt that this is a shed. The act has reference by its terms to any "hovel, shed, or fold, or to any farm building," &c. If it had said any *other* farm buildings a distinction might be drawn. We must look to the way in which the word is used in common parlance. The mode in which the structure is covered in, seems to me to make no difference. In the Liverpool docks, for instance, there are a great many places called sheds, which are very variously built; some are slenderly erected, some substantially and firmly, but they are all called sheds.

ERLE, J.—I have no doubt whatever that this building is a shed, and am very clearly of opinion that there are other descriptions in the indictment which would include it.

MARTIN, B., concurred.

Conviction affirmed.

Garde for the prosecution.

Pulling for the prisoner.

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OXFORD CIRCUIT.

SHROPSHIRE SPRING ASSIZES, 1851.

March 31.

(Before PATTESON, J.)

REG. v. THOMAS JONES. (a)

Threatening letter—What is a sufficient sending or uttering of, under statutes 4 Geo. 4, c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1.

The intentionally putting a threatening letter in a place where it is likely to be seen and read by the party to whom it is directed, or to be found by some other person, and which is in fact so found and conveyed to the party, is an uttering of the letter within the statute 10 & 11 Vict. c. 66, which makes it felony if any person shall knowingly send or deliver, or utter to any other person, any letter or writing threatening to kill or murder any other person.

THE prisoner was indicted for having, on the 11th of March, 1850, at the parish of Berrington, feloniously sent to one Mary Bright, a certain letter, set out in the indictment, threatening to kill her. In another count the indictment charged the defendant with uttering the same letter to Mary Bright.

Scotland, in stating the case for the prosecution, explained that the indictment was founded on two acts of Parliament (the 4 Geo. 4, c. 54, s. 3; and the 10 & 11 Vict. c. 66, s. 1), which provided, that if any person should knowingly and wilfully send or deliver any letter or writing threatening to kill or murder, he should be guilty of felony, and should be liable to be transported beyond the seas for life, or for any term not less than seven years; or to be imprisoned, with or without hard labour, for any term not exceeding four years. (b)

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

(b) The statute 4 Geo. 4, c. 54, sect. 3 (repealing 9 Geo. 1, c. 22, sect. 1, and 27 Geo. 2, c. 15, so far as the same related to the sending and delivering letters in the cases therein mentioned), enacts "That if any person shall knowingly and wilfully send or deliver any letter or writing with or without any name or signature subscribed thereto, or with a fictitious name or signature (demanding money or other valuable thing), or threatening to kill or murder any of His Majesty's subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of corn or grain, hay or straw (or shall knowingly and wilfully send or deliver any such letter or writing, threatening to accuse any of His Majesty's subjects of any crime punishable with death, transportation, or pillory, or of any infamous crime, with a view or intent to extract or gain money, security for money, goods or chattels, wares or merchandise, from the person or persons so threatened), or shall procure, counsel, aid or abet the commission of the said offences or of any of them, or shall forcibly rescue any person being lawfully in custody of any officer or other person for any of the said offences; every person so offending being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any such term not less than seven years, as the court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding seven years." The 7 & 8 Geo. 4,

It appeared that Mary Bright and the prisoner were both in the service of Mr. Samuel Meer, in the parish of Berrington; that the prisoner was there before the prosecutrix came into the service, and that several anonymous and threatening letters had been received by her prior to the one which was the subject of the present indictment. The letter in question was found underneath the table-cloth in the kitchen, on the 11th March, enclosed in brown paper, and directed "Mary Bright, Berrington, post-paid." It was as follows:—

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"Berrington.

"Mary Bright,—I now wright to you agin hoping this will find you worse then any of them have for I should be very glad to hear of your leven your places and going to the Devel * * * you went to toun on sunday and that * * * other * * * did but you come back with them or I should have cut your throat then if you had come home before them for I was on the looke out for you all the eveing, but I will put some posen in your tea if I cannot get a chance to kill you but I will shout you or cut your throyt when I can get you by yourself for if you get that poleesman to take me up you will not find kinefe or gun in the house but I will kill you whin I come out out of Giall if you have me up for it but I will kill you before if I can."

Sarah Jane Willett, the principal witness called against the prisoner, stated that she was in the service of Mr. Samuel Meer. She recollected the prisoner coming into the kitchen to his luncheon about twenty minutes past nine, on the morning of the 11th instant. She went out soon after to get some coal, and as she passed the kitchen window she looked through and saw the prisoner put a small brown-paper parcel under the table-cloth. She went on and got the coal, and returned again immediately; she put some coal on the fire, and afterwards went to the washing in the brewhouse. The prisoner passed by her four or five minutes after she had left the kitchen. She went back into the kitchen, lifted

c. 27, repealed the above act, 4 Geo. 4, c. 54, "except so far as relates to any person who shall send or deliver any letter or writing threatening to kill or murder, or to burn or destroy, as therein mentioned, or shall be accessory to any such offence, or shall forcibly rescue any person being lawfully in custody for any such offence."

The 10 & 11 Vict. c. 66 (An Act for extending the Provisions of the Law respecting threatening Letters, and accusing Parties with a view to extort Money), without noticing the statute 4 Geo. 4, c. 54, enacts (sect. 1,) "That if any person shall knowingly send, or deliver, or utter to any other person any letter or writing accusing, or threatening to accuse either the person to whom such letter or writing shall be sent or delivered, or any other person, of any crime punishable by law with death or transportation, or of any assault with intent to commit any rape, or of any attempt to endeavour to commit any rape, or of any crime in and by the said last-mentioned act defined to be an infamous crime, with a view or intent to extort or gain, by means of such threatening letter or writing, any property, money, security or other valuable thing, from any person whatever, or any letter or writing threatening to kill or murder, any other person, or to burn or destroy any house, barn or other building, or any rick or stack of grain, hay or straw, or other agricultural produce; or shall knowingly procure, counsel, aid or abet the commission of the said offences or either of them; every such offender shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the court to be transported beyond the seas for life, or for any term not less than seven years; or to be imprisoned, with or without hard labour for any term not exceeding four years; and if a male, to be once, twice or thrice publicly or privately whipped (if the court shall think fit), in addition to such imprisonment."

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up the cloth on the table, and found a small brown-paper parcel. The letter produced was in the parcel. She called Mary Bright and the washerwoman, and gave the parcel to Bright.

The other witnesses examined were the prosecutrix (Mary Bright) and Miss Margaret Meer. The prosecutrix proved that when she laid the cloth, on the morning in question, there was no parcel on the table. Miss Meer stated that she had a conversation with the prisoner about the previous letters, on the last day of February. He said he thought there was no chance of the person who had sent them being found out. She replied, that if they could find out the guilty person, the party would very likely get transported; he denied positively any knowledge of the person who had sent the letters. The prisoner had not conducted himself well in the service; he had been dissatisfied with the quantity of beer. Witness had given orders to Mary Bright as to the beer to be allowed to the men, and she had strictly obeyed that order.

At the close of the case for the prosecution,

Phillimore submitted to his Lordship, that the fact of placing this letter under the table-cloth, could not be held to be a sending or an uttering. The 10 & 11 Vict. c. 66, enacted—"That if any person shall knowingly send or deliver, or utter to any other person," amongst other things, "any letter or writing threatening to kill or murder any other person" shall be guilty of felony. The indictment in this case charged a sending and also an uttering; could it be said that the prisoner in this case sent or uttered the letter to Mary Bright? With reference to former repealed statutes, 9 Geo. 1, c. 22, and 27 Geo. 2, c. 25, this very case was put as a doubtful point in *East's Pleas of the Crown* (chapter 22, s. 5, vol. 2, p. 1123.) The statutes, however, differed from the statutes of Victoria, in merely using the words "knowingly sending any letter," &c. The learned text-writer referred to, put this question, "Whether, if one intentionally put a letter in a place where it is likely to be seen and read by the party for whom it is intended, or to be found by some other person who it is expected will forward it to such party, and the letter do accordingly reach its intended destination, this may not be said to be a sending to *such party*, supposing such an allegation to be necessary upon the true construction of the acts." In the present case, the indictment charged the sending to Mary Bright. He submitted that there was no sending of the letter to her in this case; there was no proof of handwriting; the letter was not sent by the prisoner to her. The statutes, in using the words sending or deliver, clearly contemplated,—first, the case of a party writing a letter and sending it by post, or by the hands of a third person; and, secondly, the case of personally delivering a letter into the hands of the party for whom it was intended. Then was there an uttering to Mary Bright, which was necessary, both by the indictment and the terms of the statute? He submitted there was not.

Scotland, for the prosecution, observed that there were two statutes now in force applicable to offences of this kind; one was

the statute 4 Geo. 4, c. 54, sect. 3. That made it felony "if any person shall knowingly and wilfully send or deliver any letter or writing with or without any name or signature subscribed thereto, or write a fictitious name or signature, &c., threatening to kill or murder any of His Majesty's subjects," &c. Then came the statute 10 & 11 Vict. c. 66, which made use of the additional term "utter" without repealing the prior statute. He contended that there was a sending within the statutes, but at all events there was an "uttering." There could be no doubt that the prisoner placed the letter on the table for the purpose of its reaching Mary Bright by some means. He parted with the possession of it.

PATTERSON, J. said he thought there was evidence of an uttering, but he would take a note of Mr. Phillimore's objection.

Phillimore then addressed the jury.

The jury returned a verdict of Guilty.

His Lordship intimated to Mr. Phillimore, that if he should, on consideration, feel any doubt as to the construction of the act, he would state a case for the opinion of the judges.

In passing sentence, he said to the prisoner, "Your learned counsel has stated some difficulties in point of law. I do not think there are any, but if I should find there are, on further consideration of the case, I will have them considered in London. In the meantime I must pass such a sentence on you as the case seems to require. The sentence is, that you be imprisoned and kept to hard labour in the house of correction for two years."

[No case was stated, the learned judge being satisfied of the correctness of his opinion.—
J. E. D.]

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WESTERN CIRCUIT.

WILTSHIRE SPRING ASSIZES, 1851.

Salisbury, March 11.

(Before POLLOCK, C. B.)

REG. v. CLARK. (a)

Practice—Examination of prisoner before magistrates.

It is an improper practice for counsel for the prosecution to make any comment by way of reproach upon the fact that the witnesses whom the prisoner produces were not examined before the magistrates.

Where a prisoner was clearly spoken to by one or more as the person by whom the crime was committed, it is the duty of the magistrate to commit, and therefore it would be useless to call witnesses then to prove an alibi or anything else in his favour.

IN the course of this case, which was an indictment for burglary,

Edwards (for the prisoner) said that he should call witnesses to prove that he was at home on the night in question, many miles from the prosecutor's house. These witnesses were not examined before the magistrate, and perhaps some observations might be made on that account, as was often done in similar cases. But the witnesses went to the magistrates' meeting, and were not called, by the advice of the prisoner's attorney.

POLLOCK, C. B., said that in his opinion no such remark ought to be made as to witnesses not being called for a prisoner when he is being examined before the magistrates, and, if made, it would be very improper. Where a prisoner was clearly spoken to by one or more persons as the person by whom a crime was committed, it would be the duty of the magistrates to commit, and it would be quite useless to call witnesses on the part of a prisoner either to prove an *alibi* or anything else in his favour; it would be an useless expense to call them twice to prove the same thing, and a thing which no discreet attorney ought to advise his client to incur. That had always been his opinion, and therefore he never allowed such observations to be made.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

WESTERN CIRCUIT.

DEVON SPRING ASSIZES, 1851.

Exeter, March 21.

(Before MARTIN B.)

REG. v. HARRINGTON.(a)

Manslaughter.

If two or more persons go out together with a purpose to commit a breach of the peace, and, in the course of the accomplishment of that common design, one of them kills a man, the other also is guilty of manslaughter.

PRISONER was indicted for manslaughter.

Rowe, Q. C., and Collier, for the prosecution.

E. W. Cox for the prisoner.

The facts proved were that the prisoner with another man unknown, in a state of intoxication, were seen in the streets of Plymouth, making a disturbance at night, and flinging stones at and abusing the passers by. Shortly afterwards the deceased, with another man, passed them as they were standing against a wall; as they passed, the prisoner and his companion struck the two men, and of the blow the deceased afterwards died. There was no evidence to show whether the blow that produced the death was struck by the prisoner or by his companion.

E. W. Cox (for the prisoner) contended that, under these circumstances, the prisoner was entitled to an acquittal. As there was no evidence by whom the fatal blow was struck, the jury could not be permitted to make a guess of it, as was laid down by Mr. Justice Talfourd, in *Bird's case*, and which ruling has received the sanction of all the judges. Nor could the prisoner be convicted as an accessory, for, in manslaughter, there are no accessories, because the very essence of the crime is sudden impulse, and that could not be shared by another. Therefore, it was either murder or only a misdemeanor, in which all being principals, the assault of one might, perhaps, be deemed the assault of the other. Then it only remained to say that, being out together in pursuit of an illegal purpose, the act of one done in pursuance of that purpose is the act of all. Undoubtedly it is so in felony; if several go out to commit a felony, and one, in pursuance of the common object, commits murder, it is murder in all. But the reason of this is, that the law formerly treated all felonies as of equal magnitude,

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

~~The~~ ~~man~~ is not applicable
may vary from almost
than a felony. It shocks
twenty persons go out to
scarcely an offence in morals,
the street, or pull bells, and
and assent of the rest, knocks
that all of them are guilty of
so held in the instance of a prize
principals, all went with an equal
which not only did result in death, but
submitted, first, that a felony committed
in pursuance of a common design to commit a
not make the rest guilty of felony; and,
it were so held, inasmuch as the essence of
premeditation, and consequently
necessary to manslaughter, the prisoner could not,
proof that he struck the blow, be guilty of man-
slayer of murder. If, because they were pursuing a
purpose, he is responsible for the act of the other,
murder, and murder only, for the illegal object in
they are engaged makes it murder.

B., in summing up the case to the jury, said,—I
think it right that I should at once state to you that, in my opinion,
you ought not to convict this man of murder. I think the whole
circumstances are much too complicated, and there is too much
doubt in them to justify you in finding him guilty of murder, but
I do not wish in the slightest degree to weaken what has been
stated by the learned counsel for the prisoner, that you ought to
apply your minds with the greatest care to the case, and ought not
to convict unless you are thoroughly convinced of the guilt of the
prisoner, because, if you convict him of manslaughter, he will have
to suffer the most severe punishment the law allows for that
offence. I will tell you this, that before you convict him of man-
slaughter, you ought to be satisfied of three facts,—first, that one
of the two men who were standing near the tollhouse struck the
blow, for, if you are not satisfied that that fatal blow was struck
by one of those two men, you ought not to convict the prisoner at
all: therefore the first fact you resolve should be, whether Ambrose
received that blow from one of the two men standing at that place;
secondly, you ought to be satisfied that the prisoner was one of
those two men; and, thirdly, you ought to be satisfied that the
prisoner and the other man were there together for the purpose of
committing a breach of the peace, assaulting persons who passed,
and while acting there together in that common object, the fatal
blow was given; because then I think it immaterial which struck
the blow, for if men join together to break the peace, if in the
course of that transaction a fatal blow is struck, in my opinion
that is the blow of all, and although the person before you is not
the man who actually struck the blow, he is equally guilty with

the man who actually did it. If two men are together with no unlawful object, and one inflicts a blow on another, common sense would tell you that that man alone is guilty, but common reason would tell you that where there are two persons engaged in one common unlawful object of breaking the peace, the act of one is the act of both. His Lordship then went through the whole of the evidence, and repeated the caution he had given on commencing his summing up.

A juror asked if they could find the prisoner guilty of an assault?

MARTIN, B. said—No. If the prisoner struck the blow and caused the death, it was manslaughter. He would advise the jury to retire.

The jury then retired. Having returned into court they acquitted the prisoner of murder, but found him guilty of manslaughter.

The prisoner was then sentenced to be transported for life.

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WESTERN CIRCUIT.

CORNWALL SPRING ASSIZES, 1851.

Bodmin, March 29.

(Before POLLOCK, C. B.)

REG. v. J. M. HILL. (a)

Threatening letter—Standing corn.

Sending a letter threatening to burn standing corn is not an offence within the statute 4 Geo. 4, c. 54, s. 3. (b)

PRISONER was indicted for sending to the prosecutor, Samuel Hill, a threatening letter.

Moody and S. S. Rogers for the prosecution.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

(b) 4 Geo. 4, c. 54, s. 3, enacts that if any person shall knowingly and wilfully send or deliver any letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature * * threatening to kill or murder any of His Majesty's subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of corn or grain, hay or straw * * or shall procure, counsel, aid or abet the commission of the said offences * * every person so offending being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any such term, not less than seven years, as the court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding three years.

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death being the punishment of all. That reason is not applicable to a misdemeanor, the guilt of which may vary from almost nothing up to more serious wrong even than a felony. It shocks our sense of propriety to say that if twenty persons go out to commit some offence in law, which is scarcely an offence in morals, as, for instance, to make a noise in the street, or pull bells, and one of them, without the knowledge and assent of the rest, knocks down a man, who dies of the blow, that all of them are guilty of manslaughter. True, it has been so held in the instance of a prize fight; but in that case all were principals, all went with an equal purpose to do the very act which not only did result in death, but was likely to do so. He submitted, first, that a felony committed by one of several, in the course of a common design to commit a misdemeanor only, did not make the rest guilty of felony; and, secondly, that, even if it were so held, inasmuch as the essence of manslaughter is absence of premeditation, and consequently there can be no accessory to manslaughter, the prisoner could not, in the absence of proof that he struck the blow, be guilty of manslaughter, but only of murder. If, because they were pursuing a common illegal purpose, he is responsible for the act of the other, that act is murder, and murder only, for the illegal object in which they are engaged makes it murder.

MARTIN, B., in summing up the case to the jury, said,—I think it right that I should at once state to you that, in my opinion, you ought not to convict this man of murder. I think the whole circumstances are much too complicated, and there is too much doubt in them to justify you in finding him guilty of murder, but I do not wish in the slightest degree to weaken what has been stated by the learned counsel for the prisoner, that you ought to apply your minds with the greatest care to the case, and ought not to convict unless you are thoroughly convinced of the guilt of the prisoner, because, if you convict him of manslaughter, he will have to suffer the most severe punishment the law allows for that offence. I will tell you this, that before you convict him of manslaughter, you ought to be satisfied of three facts,—first, that one of the two men who were standing near the tollhouse struck the blow, for, if you are not satisfied that that fatal blow was struck by one of those two men, you ought not to convict the prisoner at all; therefore the first fact you resolve should be, whether Ambrose received that blow from one of the two men standing at that place; secondly, you ought to be satisfied that the prisoner was one of those two men; and, thirdly, you ought to be satisfied that the prisoner and the other man were there together for the purpose of committing a breach of the peace, assaulting persons who passed, and, while acting there together in that common object, the fatal blow was given; because then I think it immaterial which struck the blow, for if men join together to break the peace, if in the course of that transaction a fatal blow is struck, in my opinion that is the blow of all, and although the person before you is not the man who actually struck the blow, he is equally guilty with

the man who actually did it. If two men are together with no unlawful object, and one inflicts a blow on another, common sense would tell you that that man alone is guilty, but common reason would tell you that where there are two persons engaged in one common unlawful object of breaking the peace, the act of one is the act of both. His Lordship then went through the whole of the evidence, and repeated the caution he had given on commencing his summing up.

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The prisoner was then sentenced to be transported for life.

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WESTERN CIRCUIT.

CORNWALL SPRING ASSIZES, 1851.

Bodmin, March 29.

(Before POLLOCK, C. B.)

REG. v. J. M. HILL. (a)

Threatening letter—Standing corn.

Sending a letter threatening to burn standing corn is not an offence within the statute 4 Geo. 4, c. 54, s. 3. (b)

PRISONER was indicted for sending to the prosecutor, Samuel Hill, a threatening letter.

Moody and S. S. Rogers for the prosecution.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

(b) 4 Geo. 4, c. 54, s. 3, enacts that if any person shall knowingly and wilfully send or deliver any letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature * * threatening to kill or murder any of His Majesty's subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of corn or grain, hay or straw * * or shall procure, counsel, aid or abet the commission of the said offences * * every person so offending being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any such term, not less than seven years, as the court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding three years.

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letter.**Cole*, for the prisoner.

Cole took a preliminary objection to the indictment, the letter, as set out, not showing any threat to burn houses, barns, or ricks of corn, and therefore charging no offence within the statute. It first alleged that there had been, prior to the sending the letter in question, incendiary fires at Mallion, and then stated that the prisoner had sent a letter to Samuel Hill, threatening to burn his houses, barns, ricks, and stacks of grain, and then set out the letter, which was directed to the prosecutor, and was in the following words:—

“It is the provence of the Almighty that is gest com to my knolege aboute your treatment of yourself and whife to the old man yet made him do jest as you like so I warne you shant do jest as you plase by me. If william is so quoiety you shant find it the case with me; let you go wear you like you shore to be found out, you meae think that goine to be safe becose you goine to leve the Lizard; the a specimint of it in Mallion for you to go by. Prapes you mat read of Sampson Riddle and the fox Philistines. If no foxes to bit got thee may somfing in steed. If the not somfing don very shortly you not go onponished. I warne you I not prise you of any more. I think you injoyment will be very short in this world. Silfeshness will not indoer long.

“I jest let you know wot I meane you; you ben a very great enemey to me, bot by god I not forgit you if my life is spared. Vingens is mion, and I will repairt so shore is a god in heving. So no more.

“JOSEPH MITCHELL.

“September 14, 1850.”

He contended that the only expression in the letter which could be construed as being a threat to burn, was that part which spoke of Samson and the Philistine foxes; now, if reference were made to the Book of Judges, it would be found that what is recorded of Samson there is that he tied 300 foxes two by two, with a fire-brand between each, and turned them into the standing corn of the Philistines, which was thereby consumed. If, therefore, the letter contained any threat to burn at all, it was a threat to burn standing corn, and not houses, barns, and ricks, as laid in the indictment; and as it was no offence under the statute to threaten to burn standing corn, the letter did not come within the act.

Moody and *Rogers* contended that any threat to burn was sufficient to support the indictment, and that the allusion to Mallion in the letters, where there had been houses and barns burnt, would explain what the threat meant.

The LORD CHIEF BARON said he would not stop the case, but would take a note of the objection.

It was then proved that the prosecutor and the prisoner were brothers. The prosecutor was a farmer, living near the Lizard, and near to the forest of Mallion, which had for the last two years been the subject of several incendiary fires, which had spread alarm and terror in the neighbourhood, and many threatening letters had been sent to the various farmers. Some time

since, the father of the prosecutor (and his brother, the prisoner) died, and left all his property to the prosecutor. This much enraged the prisoner, and the brothers were on bad terms, and on the 18th of September the prosecutor received through the post the letter which was the subject of the indictment. This letter, the learned counsel stated, would be proved to be in the handwriting of the prisoner, and statements of the prisoner relative to it would be proved which would leave no doubt that the letter had been written by him; indeed, it was signed in his name, as he as often went by the name of Joseph Mitchell as Joseph Mitchell Hill.

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John Harris, a carpenter, said that he knew the prisoner, and that he had had a conversation with him. The prisoner said he had not been served fair about his father's property, and that he had written a letter to his brother to frighten him, and get some of the property, and that he had said in it that he would serve him as Samson did the Philistines.

On cross-examination, he stated that he also said that Samson had tied two foxes' tails together, with a firebrand between them, and sent them into the standing corn.

Two witnesses were then called to prove the fact of incendiary fires having taken place in Mallion, to houses, barns, and stacks of corn; but on cross-examination they both stated that a quantity of standing barley had on one occasion been burnt, and that the fact was well known all about the neighbourhood.

Cole then submitted that the prisoner must be acquitted, as the evidence had already failed to make out the threat laid in the indictment, it now appearing clearly by Harris's evidence that the threat intended to be made by the prisoner was a threat to burn standing corn, and with regard to the allusion in the letter to Mallion, it had been shown that standing corn had been burnt there, as well as houses, and barns, &c.

Moody, contra.

The LORD CHIEF BARON said he thought the point taken by Mr. Cole was a good one, and must prevail. It appeared to him that there was no evidence of any threat to burn, except to burn standing corn. In his opinion the explanation given by the prisoner to Harris of what he meant by what he had written in the letter must be taken into consideration in attaching a meaning to that letter, and the allusion to Mallion might well be explained to mean the same thing, as it was shown that standing corn had been burnt there as well as houses; and if there was a construction which could be fairly put on the letter consistent with that view of the case, such a construction ought to be taken, and not a forced one, to make the prisoner guilty of so serious a crime as that charged in the indictment. In his opinion, the fair construction to be put on the letter was that it contained a threat to burn the standing corn of the prosecutor, and, if so, that was not an offence under the statute, which only spoke of houses, barns, stacks of corn, &c., and did not mention standing corn.

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letter.*

The jury, under the direction of the Lord Chief Baron, acquitted the prisoner.

This was the last case of the assizes here.

WESTERN CIRCUIT.

SOMERSET SPRING ASSIZES, 1851.

Taunton, April 4.

(Before POLLOCK, C. B.)

REG. v. PALMER. (a)

Practice—Cross-examination—Depositions.

The practice of placing his deposition in the hands of a witness on cross-examination, and asking him if, having read it, he still persists in his statement, is wrong in principle, and will not be permitted.

The proper course is to put the deposition in evidence, for the purpose of contradicting the witness.

EDWARDS, for the prisoner, on cross-examination of a witness, proposed to place the deposition in his hands, and when he had read it, to ask him if he still persisted in his statement.

Phinn, for the prosecution, objected. Although formerly allowed, many of the judges had lately deemed the practice improper, and refused to sanction it.

Cox (*amicus curiæ*) said, that at the last Devon Assizes he had made a similar objection, but it had been overruled by Baron Martin, who permitted the depositions to be so used.

POLLOCK, C. B.—That was so; but my brother Martin proceeded upon analogy with the practice at Nisi Prius, where the witness is allowed to refer to memoranda written at the time of the transaction, in order to refresh his memory; and, perhaps, if the question were to be raised before him now, he would be of a different opinion. But a deposition is not the witness's own memorandum, made by him contemporaneously with the occurrence of the facts stated there, but a narrative taken down by somebody else from a statement subsequently made by him, and therefore, although very good evidence for the purpose of contradicting him, it differs from the principle of the cases that relate to refreshing

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

memory. It appears to me to be quite clear upon principle, apart from the recent decisions of many of the judges, that the practice formerly permitted by some of them is wrong, and that the depositions cannot be so used.

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v.
PALMER.
1851.

Practice—
Cross-examina-
tion—
Depositions.

[NOTE.—The reason of the rule appears to be this. A memorandum made at or near the time of the occurrence there stated is allowed to be used to refresh the memory of the witness, in order that he may be enabled to make a more accurate statement of the facts. But depositions are used in cross-examination, not for the purpose of refreshing the witness's memory, but for the purpose of making him admit that he has contradicted himself, and such is not the proper means of attaining that object: (see *Reg. v. Ford*, ante, p. 185.)—E. W. C.]

COURT OF CRIMINAL APPEAL.

April 26, 1851.

(Before LORD CAMPBELL, C. J.; ALDERSON, B.; COLERIDGE, J.;
PLATT, B.; and TALFOURD, J.)

REG. v. DAVIS. (a)

Indictment—Variance—Prosecutor's name—Idem sonantia.

This court refused to say that Darius and Tryus were idem sonantia, the question not having been left to the jury.

THIS case was reserved by the Dorsetshire Sessions.

The prisoner was indicted for stealing the goods of Darius Christopher. The evidence proved the prosecutor's name to be Tryus Christopher. The chairman ruled that, in Dorsetshire, Darius and Tryus were *idem sonantia*, but requested the opinion of the judges upon the correctness of that ruling. When this case came on to be heard, on the 8th February, before Jervis, C. J., Alderson, B., Williams, J., Platt, B., and Martin, B., (b) the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

(b) On that occasion *Fyfe* appeared for the prisoner, and the following cases were referred to: *Williams v. Oyle*, 2 Stra. 889, where Segrave and Seagrave were held *idem sonantia*; *Reg. v. Shakespeare*, 10 East, 83, where the contrary was held as to the words Shakespeare and Shakepear; *R. v. Wilson*, 2 Car. & K. 527, where McNicholl was proved and McNicole averred, and held no variance; *R. v. James*, 2 Cox C. C. 227, where the prosecutor was erroneously described as J. H. S. instead of H. J. S., and the variance was held fatal; *R. v. Leppiat*, 1 Cox C. C. 56, where the prosecutrix was described Sarah B. instead of Sarah Anne B., her baptismal name; and the prisoner was acquitted on the ground of the misnomer, though it was proved that the prosecutrix was called in her own family Sarah; *R. v. Bridget Smith*, *ib.* 248, where the prosecutor was described as *Patrick Henry S.*, which was his baptismal name; but he had always been called Patrick or Henry, was confirmed by the name of Henry, and afterwards generally called so. Held, that he ought to have been so described in the indictment.

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v.
DAVIS.
—
1851.
—
Variance—
Idem sonans.

court intimated that it was a question for the jury, and directed the case to be sent back, in order that it might be stated whether the question had been left to the jury. The case was now returned, with a statement that the question of variance was not left to the jury.

LORD CAMPBELL, C. J.—This conviction must be reversed. If it is put as a matter of law, it is quite impossible for this court to say that the two words are *idem sonantia*. The objection is said to have been taken in arrest of judgment; but I never heard of such a ground for arresting the judgment since the great case of *Stradley v. Styles*.

COLERIDGE, J.—No doubt a Dorsetshire jury would have thought the words *idem sonantia*.

Conviction reversed.

COURT OF CRIMINAL APPEAL.

April 26, 1851.

(Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J.,
PLATT, B., and TALFOURD, J.)

REG. v. HALLETT. (a)

Perjury before an arbitrator appointed under the County Court Act.

An arbitrator appointed under s. 77 of 9 & 10 Vict. c. 95, has no authority to administer an oath.

THE following case was reserved by Talfourd, J.:—

CASE.

The prisoner was indicted at the last Gloucester Assizes for perjury, committed before an arbitrator on an arbitration directed by order of the judge of the County Court, and consent of the parties, pursuant to the 77th section of the 9 & 10 Vict. c. 95. The oath was administered in the usual form by the arbitrator appointed. It was objected for the prisoner that the arbitrator had no power either under the County Court Act or otherwise to administer the oath, and that neither by that act or otherwise was a party sworn and giving evidence at such arbitration, made liable to the pains of perjury.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

The prisoner was found guilty; I respited the judgment, and reserved the point for the opinion of the Court of Criminal Appeal. The question for the opinion of this court is, whether an indictment for perjury will lie in respect of an oath so taken and evidence so given.

Skinner, for the prisoner.—This conviction cannot be sustained, because the arbitrator had no authority to administer an oath to the prisoner. In *Watson on Awards*, p. 103, 2nd edit., it is said, "Before the recent stat. of 3 & 4 Will. 4, c. 42, an arbitrator had no power to administer an oath to the witnesses to be examined in the course of the reference. In references by rule of court, or judge's order, it is usually provided that the witnesses shall be sworn before a judge, a Master in Chancery, or a commissioner. It is apprehended that even on the reference of a cause under a rule or order of court, a witness would not, before the late statute, have been indictable for perjury committed in giving his evidence before an arbitrator, on an oath administered under such a power." Unless therefore that statute or the County Courts Act (9 & 10 Vict. c. 95) gives the arbitrator authority to administer the oath, it is clear that he had no authority to do so. Now, the 3 & 4 Will. 4, c. 42, s. 41, merely provides "that where in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator, &c. to administer an oath," &c.; and that provision clearly has no application to a reference under the County Court Act. But reliance will be placed on s. 77 of 9 & 10 Vict. c. 95 (the County Court Act), which provides "that the judge may in any case, with the consent of both parties to the suit, order the same with or without other matters within the jurisdiction of the court in dispute between such parties, to be referred to arbitration, &c.; and such reference shall not be revocable by either party except by consent of the judge; and the award of the arbitrator, &c., shall be entered as the judgment in the cause, and shall be as binding and effectual to all intents as if given by the judge, provided that the judge may, if he think fit, on application to him at the first court, &c., set aside any such award, &c., or may, with the consent of both parties, revoke the reference or order another reference," &c. Now, that gives no authority to the arbitrator to administer an oath; and the witnesses therefore ought to be sworn by the proper officer of the court, by which the reference is ordered according to sect. 83, which enacts, that "on the hearing or trial of any action, or on any proceeding under this act, the parties thereto, (b) their wives, and all other persons, may be examined, &c., upon oath or solemn affirmation, to be administered by the proper officer of the court."

McMahon, contra.—It is not contended that authority to ad-

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v.
HALLETT.
—
1851.

*Perjury before
arbitrator
under County
Court Act.*

Argument.

(b) The prisoner was one of the parties to the cause in the County Court.

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v.
HALLETT.

1851.

*Perjury before
arbitrator
under County
Courts Act.*

minister an oath is expressly given in this case by any statute; but the arbitrator is invested by this act of Parliament with judicial authority. He is an officer appointed to hear and determine, and incident to that duty is the power of administering an oath. The judges who sit under commissions of oyer and terminer have no higher authority; and yet it was never disputed that they may lawfully administer an oath to the witnesses upon whose testimony their decision in any particular case must depend. So, the commission of the peace does not expressly authorize justices to administer an oath; yet for upwards of two hundred years, from the first institution of the office, they were in the daily practice of administering oaths touching various matters within their jurisdiction, with the approbation of learned lawyers, who considered that authority incident to and necessarily annexed to the office: (Burn's Justice, title "Oaths," l.; Bro. Abr. "Examination" (P. C.); Lambard's Eirenarcha, 213.)

Judgment.

LORD CAMPBELL, C. J.—This was certainly a very proper case to be reserved, but the question is one upon which I entertain no doubt. The case must depend upon s. 77 of the County Court Act, and that only gives the judge power to refer a matter to arbitration, and provides that the award shall have the effect of a judgment of the County Court. Under that clause, therefore, I think that the arbitrator had no power to administer an oath, and that the conviction is wrong. The power to administer an oath must be expressly conferred by statute, except where the proceedings follow the course of the common law, and that power is incident to the authority to hear and determine. In the case of arbitrations under the authority of the Superior Courts, sect. 41 of 3 & 4 Will. 4, c. 42, does confer that power; but there is nothing in the County Courts Act which can have a similar effect. In *Groenvelt v. Burwell* (1 Lord Raym. 474), Holt, C.J., observes, that "where judicial power is given to persons by statute, they may, by consequence of law, administer an oath;" and though the report adds that the learned judge would not give a positive opinion as to that, I cannot entertain a doubt that where judicial power is given to any one to proceed according to the course of common law, that person has authority to administer an oath; but that is not the present case.

COLERIDGE, J.—It must not be supposed that we consider that there is any distinction between an oath administered to one of the parties, and an oath administered to one who is merely a witness.

The other judges concurring,

Conviction reversed.

COURT OF CRIMINAL APPEAL.

April 26, 1851.(Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J.,
PLATT, B., and TALFOURD, J.)

REG. v. POYSER.

Larceny—Determination of bailment.

A. employed B. to sell clothes for him. B. received for that purpose a parcel of clothes, a separate price being fixed by A. upon each article. B. was to be paid a per centage upon the amount received, and to bring back the clothes not sold. Instead of selling any, he fraudulently pawned some, and kept the rest for his own use.

Held, that as there was but a single bailment of all the articles, the misappropriation of part determined the bailment as to the rest; and that B. was properly convicted of a larceny of the articles which he had kept.

THE following case was reserved by Alderson, B.

CASE.

The prisoner was indicted for larceny of clothes at the last assizes for the county of Leicester. It appeared at the trial that the prisoner was employed by the prosecutor, who was a tailor, to sell clothes for him about the county on the following terms: the prosecutor fixed the price of each article, and the prisoner was intrusted to sell them at that fixed price; and when he had done so was to bring back the money and the remainder of the clothes unsold, and was to have 3s. in the pound on the moneys received for his trouble. On the 12th February last he took away a parcel of clothes upon these terms, and instead of disposing of them according to the above arrangement, he fraudulently pawned a portion of them for his own benefit; and having so done, he afterwards fraudulently appropriated the residue to his own use. These facts having appeared, the learned judge directed the jury that the original bailment of the goods by the prosecutor to the prisoner was determined by this unlawful act, in pawning part of them; and that the subsequent fraudulent appropriation by the prisoner of the residue of the goods to his own use would, in point of law, amount to larceny. Upon this direction the prisoner was found guilty, and his lordship requested the opinion of the judges whether this direction was right.

O'Brien, for the prisoner.—The conviction cannot be sustained.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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v.
POYNER.
—
1851.
—
*Larceny—
Bailment.*

The prisoner had lawful possession of the goods under a contract of bailment, which had not been determined. There had been no resumption of possession by the prosecutor; and therefore there was no larceny, as was said by Parke, B., in *R. v. Stear* (1 Den. C. C. 349, 355; 3 Cox C. C. 187.) "If there had been merely a countermand of the bailment and no redemption of possession, there would have been no larceny." (b) The same law is laid down in 2 East P. C. 627, 691. (c) How can it be said in the present case that there was any resumption of possession by the owner, and a new and distinct taking by the prisoner, which would have enabled the owner to maintain trespass? If so, at what moment did he resume possession? [LORD CAMPBELL, C. J.—As soon as the bailment had been determined by the tortious act of the bailee.] But the prisoner was guilty of no previous tortious act with respect to the particular goods which he has been convicted of stealing. [LORD CAMPBELL, C. J.—As soon as he had unlawfully dealt with any part of the goods, the bailment as to all was determined, because the case shows that there was but one bailment.] It is submitted that the facts do not warrant that inference. On the contrary, each article was the subject of a distinct contract. The owner fixed the price of each article separately; and the transaction was the same as to each article contained in the parcel as if he had delivered that article alone and instructed the prisoner to sell it for him for a price named, or bring it back, and the prisoner had afterwards misappropriated it to his own use. It is not suggested that in that case he could have been convicted of larceny. This is quite different from the cases of carriers breaking bulk, where the misappropriation of part puts an end altogether to the contract of bailment, and construc-

(b) In *R. v. Stear*, it appeared that the prosecutor had delivered his horse to the prisoner for the purpose of sale; but subsequently ordered him never again to touch the horse; and directed the stable-keeper, where the horse had been left by the prisoner, not to let the prisoner have him. The prisoner, however, went to the stable, and persuaded the ostler to let him take the horse away, saying that he had just left the party and it was all right. The prisoner was convicted of stealing the horse, and the court held the conviction right. The ground of the decision appears from the judgment of Parke, B. "If there had been merely a countermand, and no redemption of possession, there would have been no larceny; because (as was suggested in argument by Williams, J.) trespass would not have lain, but only trover; and to support an indictment for larceny, the prosecutor must have such possession as would entitle him to bring trespass; which he would not have unless the bailment were determined. But here the horse was in possession of a third person: there was no actual possession by the prisoner: the question therefore is, was the bailment determined with the assent of the prisoner? I think there is evidence for the jury that the mare was at Port's (the stable-keeper's), by consent of both parties, for the use of the prosecutor. The prisoner not having the actual possession, nor having any right to it, regained possession by a false story. He thus became a trespasser, and his act was a larceny."

(c) In 2 East P. C. c. 16, s. 3 (p. 554 of the original edition), it is said, "if the party be not guilty of a trespass in taking the goods, he cannot be guilty of felony in carrying them away. Hence it is, that if the party obtain possession of the goods lawfully, as upon a trust for or on account of the owner, by which he acquires a kind of special property in them, he cannot afterwards be guilty of felony in converting them to his own use, unless by some new and distinct act of taking, as by severing part of the goods from the rest, with intent to convert them to his own use, he thereby determines the priority of the bailment, and the special property thereby conferred upon him; in which case he is as much guilty of a trespass against the virtual possession of the owner by such second taking as if the act had been done by a mere stranger." (See also s. 115, p. 696.)

tively the possession of the owner is restored; for there, as is said in 2 East P. C. c. 16, s. 115, "the carrier is trusted with the carriage of the package in that condition."

LORD CAMPBELL, C. J.—This conviction must be affirmed. It appears by the case that there was but a single bailment; and upon that the whole question depends. If there had been a separate bailment of each article, the misappropriation of one would not have determined the contract as to the others; but the bailment being single, it is well settled that the first tortious act, inconsistent with the contract, puts an end to it; and a subsequent misappropriation *animo furandi* is larceny.

The other judges concurring,

Conviction affirmed.

REG.
v.
POYSEER

1851.

Larceny—
Bailment.

COURT OF QUEEN'S BENCH.

June 2, 1851.

REG. v. SCAIFE AND ANOTHER. (a)

Evidence—Absent witness—Depositions.

The deposition of a witness taken before a magistrate under the stat. 11 & 12 Vict. c. 42, against an accused person is not admissible in evidence against that person, upon his trial, upon mere proof that the witness is absent, and cannot be found, or that he is kept out of the way by the procurement of some one other than the accused person himself.

Therefore, when, upon the trial of three persons for a larceny, it was shown that a witness was kept away by the procurement of one of the prisoners, and the deposition of the absent witness was received in evidence generally against all the prisoners:

Held, that, as regards the two prisoners who did not procure the absence of the witness, the deposition was improperly admitted.

THIS was indictment against Matthew Scaife, Thomas Rooke, and John Smith, found at the quarter sessions for the borough of Kingston-upon-Hull, and removed into this court by *certiorari*. The indictment contained counts for stealing and counts for receiving (with knowledge of its being stolen) a large sum of money, amounting to 148*l.*, the property of Robert Brown. At the trial before Cresswell, J., at the last assizes for the county

(a) Reported by P. PARNELL, Esq., Barrister-at-Law.

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v.
SCAIFE.
—
1851.
—
Evidence—
Deposition of
absent witness.

of York, a witness of the name of Ann Garnett, who had been examined before the magistrates upon the committal of the prisoners to take their trial at the Hull Quarter Sessions, was not forthcoming. It was shown that diligent search had been made for her, but that she could not be found, and some evidence was given which satisfied the learned judge that she had been got out of the way by the procurement of the prisoner Smith. Her deposition taken before the magistrates was then tendered in evidence, but objected to by the prisoners' counsel as inadmissible. The deposition had been properly taken in the mode prescribed by the stat. 11 & 12 Vict. c. 42, and the learned judge received it in evidence. Two of the prisoners, Scaife and Rooke, were found guilty; Smith was acquitted by the jury. It appeared that, in summing up the case to the jury, and throughout the trial, the learned judge, treated the deposition as admitted in evidence generally, and drew no distinction between its admissibility against Smith, and its admissibility against the other two. In Easter Term the court granted a rule *nisi* for a new trial upon the ground of the misreception of evidence, against which

Hunter now showed cause.—The deposition of a witness who cannot be found after diligent search is in all cases admissible against the prisoner, if only it has been regularly taken. The prisoner must have had full power to cross-examine, and it is the same inquiry, and between the same parties, that is conducted at the trial as at the taking of the deposition. The principles of evidence are the same in criminal as in civil cases, and it is said in *Godbolt's Reports*, 326, Case No. 418, "And as it was further said by the court, that if the party cannot find a witness, then he he is, as it were, dead unto him, and his deposition in an English court in a cause betwixt the same parties, may be allowed to be read to the jury, so as the party make oath that he did his endeavour to find the witness, and that he could not hear of him." (See also *Comyn's Dig. Testmoigne*, C. 4, *Buller's N. P.* 239, *Green v. Gatewick*, *ibid.* 243; 1 *Taylor on Evid.* 332.) It was ruled, indeed, in *Morley's case* (6 *How. St. Tr.* 71; *S. C.*, *Kel.* 55,) that if a witness, who was examined by the coroner, were absent, and oath were made that they had used their endeavours to find him, and could not find him, the depositions could not be received, unless the judges were satisfied by the evidence that the witness was detained by means of the procurement of the prisoner; but in the case of a deposition taken before the coroner there would be no opportunity of cross-examination, and this rule itself seems to have been laid down out of mercy to the prisoner. Here, however, the witness was kept away by the procurement of the prisoners, and the deposition was (*b*) admissible upon that ground: (*Harrison's case*, 12 *St. Tr.* 852.) The sufficiency of the evidence of contrivance by the prisoner was entirely for the judge at the trial, and this court will not now review his judgment upon that question. [LORD CAMPBELL, C. J.—The deposition was admitted

(b) See *Foster's Crown Law*, 337.

generally as against all the prisoners. The judge did not direct the jury that the deposition of Ann Garnett was no evidence against either Scaife or Rooke.] The three were shown to be connected together, and the act of one, in keeping the witness away, was the act of all, on the ground of their being co-conspirators. [LORD CAMPBELL, C. J.—If that were so, the confession of one of them would have been evidence against the others. I do not see how the reception of the evidence can be supported upon the ground of contrivance. There still, however, remains the other ground.] The deposition of the witness was the best evidence of which the nature of the thing admitted. He referred to *Reg. v. Hagan* 8 Car. & P. 167; *Reg. v. Guttridge*, 9 Car. & P. 473.

Dearsley, in support of the rule.—There was no evidence that the witness was kept away by the contrivance of either Scaife or Rooke, and therefore the deposition was not admissible in evidence against either of them. Then, as to the general proposition that wherever a witness cannot be found his deposition is admissible, whatever may be the case in civil matters, it is certainly not true in criminal cases. There may be reasons for a distinction between the two, because in criminal causes there can be no bill of exceptions. In most cases the only mode in which a prisoner can show his innocence is by the cross-examination of the witnesses for the prosecution. It is most important for him, therefore, that they should be personally examined. Before the committing magistrates he has very little opportunity of cross-examining, and in practice it is always recommended, as well by his professional adviser as by the magistrates, to reserve that till his trial. There is no authority for admitting a deposition in evidence under such circumstances. On the contrary, all the text books treat the death of the witness and the procurement of his absence by the prisoner, as the only circumstance which will render his deposition receivable: (2 Russ. on Cr. 888.)

LORD CAMPBELL, C. J.—I think this rule must be made absolute for a new trial. If it were shown that Smith had resorted to any contrivance to get the witness out of the way, that would make his deposition admissible against Smith, but not against the others, and no distinction upon this head appears to have been made in the summing up of the learned judge, so that, in point of fact, the deposition of the absent witness was admitted against Scaife and Rooke, without any evidence of contrivance by either of them. Then, is such a document admissible against a prisoner without proof either that the deponent is dead, or that he is kept away by the contrivance of the prisoner, upon the bare ground that the witness is absent and cannot be found? No case has gone so far hitherto, and I should be sorry that we should now make a precedent, which might have the effect of depriving an accused person of the advantage of having the witnesses against him examined personally in the presence of the jury, with full liberty for the accused to cross-examine upon all matters which may be material to his defence.

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—
Evidence—
Deposition of
absent witness.

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SCAIFE.
—
1851.

*Evidence —
Deposition of
absent witness.*

PATTESON, J.—There was nothing shown in the way of contrivance to make the deposition admissible against any of the prisoners but Smith, and it appears to have been received generally, that is, against the other two, by whom no contrivance to keep the witness away appeared to have been practised. Smith being acquitted, there is now no question about him. Upon the general ground there seems no sufficient authority for the proposition that the deposition of a witness who cannot be found after diligent search may be used, in criminal cases, against the defendant.

COLERIDGE, J.—Before the recent statute (11 & 12 Vict. c. 42), the deposition of an absent witness was only admissible in case of the death of the witness, or of his absence being procured by the prisoner. All other cases were in one category, and the depositions of absent witnesses were inadmissible. The recent statute (11 & 12 Vict. c. 42) took the case of sickness such as to incapacitate the witness from travelling out of that category, and classed it with the two other excepted cases. But the statute would have been unnecessary, if absence simply, even where not referable to any act of the prisoner, had been sufficient to render the deposition admissible in evidence.

ERLE, J.—As regards the two prisoners Scaife and Rooke, the admissibility of this document rests only upon the absence of the witness. There is no valid authority that that is sufficient to make a deposition of this kind receivable in evidence.

Rule absolute for a new trial.

EXCHEQUER CHAMBER.

June 13, 1850.

(Coram PARKE, B., ALDERSON, B., MAULE, J., CRESSWELL, J.,
PLATT, B., and TALFOURD, J.)

GREGORY v. THE QUEEN. (a)

*Indictment for libel—Colloquium—Inuendo—Libellous matter—General judgment—Entry of retraxit—Amendments—Special direction as to treatment of prisoners.**An indictment for libel sufficiently charges it to have been published of and concerning the prosecutor, if it alleges that the defendant published a libel containing false, scandalous and malicious matters of and concerning him.**An indictment set out the following words as libellous: "If Mrs. W. chooses to entertain the Duke of B. she does what very few will do, and she is of course at liberty to follow the bent of her own inclining, by inviting all the expatriated foreigners who crowd our streets to her tables, if she thinks fit."**Held, that they were so; and that no inuendo was necessary.***I**NDICTMENT for libel, found at the Central Criminal Court, and removed by *certiorari* into the Court of Queen's Bench.

The 1st count alleged that Barnard Gregory, late of, &c., contriving, and unlawfully, wickedly and maliciously intending to injure, vilify and defame Charles Frederick Augustus William, Duke of Brunswick and Lunenberg, and to deprive him of his good name, fame, credit and reputation, and to bring him into great contempt, scandal, infamy and disgrace, on &c., at &c., unlawfully, wickedly and maliciously did print and publish, and cause and procure to be printed and published in a certain newspaper, called *The Satirist, or the Censor of the Times*, a certain false, scandalous and malicious libel, containing divers false, scandalous and malicious matters and things of and concerning the said Charles Frederick Augustus William (that is to say, setting out libellous words), to the great damage, scandal and disgrace of the said Charles, &c., against the peace of our Lady the Queen, her crown and dignity.

8th count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Barnard Gregory contriving, and unlawfully, wickedly and maliciously intending to injure, vilify

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

The publication of this and the next case has been accidentally delayed

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and defame the said Charles Frederick Augustus William, Duke of Brunswick and Lunenburg, and to deprive him of his good name, &c., fame, credit and reputation, and to bring him into great contempt, scandal, infamy and disgrace, on, &c., at, &c., did print and publish, and cause and procure to be printed and published, in a certain newspaper, entitled *The Satirist, or Censor of the Times*, a certain other false, scandalous and malicious libel, containing divers false, scandalous and malicious matters and things of and concerning the said Charles Frederick Augustus William (that is to say): "Why should Theophilus be surprised at anything Mrs. Wyndham of Connaught Place does; if she choose to entertain the Duke of Brunswick (meaning the said Charles Frederick Augustus William) she does what very few will do, and she is of course at liberty to follow the bent of her own inclining, by inviting all the expatriated foreigners who crowd our streets to her tables if she thinks fit;" to the great damage, scandal and disgrace of the said Charles Frederick Augustus William, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

The record set out a plea of not guilty, and issue thereon: *venire facias juratores*, returnable on the 16th April [15th April, in this same Easter Term, in the said sixth year of the reign of our said Lady the Queen], (b) and a continuance to the 22nd May [25th May, in Trinity Term, in the said sixth year of the reign last aforesaid], (b) by *vice-comes misit breve*, and a *distringas corpora juratorum*, returnable on the 30th October [2nd November, in Michaelmas Term, in the seventh year of the reign of our said Lady the Queen], (b) and the same day given to the coroner and attorney of the Queen, and to the defendant: "at which time, to wit, on the 30th day of October [on the said 2nd November last] (b) aforesaid, before our said Lady the Queen at Westminster, comes as well the said C. F. Robinson, who for our said Lady the Queen in this behalf prosecuteth, as the said Barnard Gregory in his proper person as aforesaid; and the said Barnard Gregory having withdrawn [withdrew] (c) his plea by him above pleaded in manner and form aforesaid, [whereby] (c) our said Lady the Queen remaineth against him, the said Barnard Gregory, without defence in this behalf: whereupon, all and singular the premises being seen and fully understood by the court of our said Lady the Queen now here, it is considered and adjudged by the said court here, that the said Barnard Gregory be convicted of the offences aforesaid, and that for his offences aforesaid he be taken, and so forth. And because the court of our said Lady the Queen now here," &c. Then followed continuances, by *curia advisari vult*, to the 11th January [in Hilary Term, in the seventh year of the reign], (d) the

(b) These amendments were made in pursuance of the rule of the Court of Queen's Bench in Easter Term, April 22, 1847.

(c) This amendment was made in pursuance of the rule of the Court of Queen's Bench in Hilary Term, Jan. 31, 1850.

(d) These amendments were made in pursuance of the rule of the Court of Queen's Bench in Easter Term, April 22, 1850.

15th April [in Easter Term, in the seventh year of the reign]; (e) the 22nd May, in Trinity Term, in the seventh year of the reign; the 2nd November, in Michaelmas Term, in the eighth year of the reign; the 11th January, in Hilary Term, in the eighth year of the reign; the 15th April, in Easter Term, in the eighth year of the reign], (e) and the 9th June [in Trinity Term, in the eighth year of the reign], (e) "at which day, to wit, on the 9th day of June aforesaid, before our said Lady the Queen at Westminster, comes the said C. F. Robinson, who for our said Lady the Queen in this behalf prosecuteth; and the said Barnard Gregory being present here in court, it is considered and adjudged and ordered by the said court here, that the said Barnard Gregory, for his offences aforesaid, whereof he is convicted as aforesaid, be imprisoned in the Queen's Prison for the space of six calendar months now next ensuing, and that he be placed in the first division of the fourth class of prisoners in the said prison; and he, the said Barnard Gregory, is now here in court committed to the custody of the keeper of the said Queen's Prison, to be by him kept in safe custody in execution of this judgment." (f)

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(e) These amendments were made in pursuance of the rule of the Court of Queen's Bench in Easter Term, April 22, 1850.

(f) The following causes of error, among others, were stated to the Court:—

11th. That it is not in the said counts of the indictment stated that the libels in those counts alleged to have been printed and published were of and concerning the said Charles Frederick Augustus William, Duke of Brunswick and Lunenburg, or were printed and published of or concerning that person, or that the scandalous matters and things in those counts respectively mentioned were contained in the said libels, or were of or concerning the said Duke of Brunswick and Lunenburg; and that although it is in each respectively of the said counts stated that the libel in each respectively of those counts mentioned contained divers false, scandalous and malicious matters and things of and concerning the said Duke of Brunswick and Lunenburg, yet each and every of those counts respectively omits to and does not directly, positively, properly or sufficiently show, state or allege what particular and specific matters and things of and concerning the said Duke of Brunswick and Lunenburg were contained in the alleged libel in each respectively of those counts mentioned; but in each respectively of the said counts it is alleged only that the libel therein mentioned contained divers false, scandalous and malicious matters and things of and concerning the said Duke of Brunswick and Lunenburg; (that is to say) and after the words "that is to say," in each respectively of the said counts, certain matters and things are stated and alleged, but the same are not in each respectively of the said counts, or in any of them sufficiently, directly, positively or properly alleged to have been or to be contained in the libel in each respectively of the said counts mentioned, or to be or to have been matters and things of and concerning the said Duke of Brunswick and Lunenburg, or to have been or to be printed or published of and concerning him.

15th. That the proceedings were not duly continued from the 11th January, in Hilary Term, in the sixth year of the reign of the Queen, to the 16th April then next, that day being Sunday.

16th. That the proceedings were not duly continued from the 16th April, in the sixth year aforesaid, to the 22nd May then next, the 22nd May being a day in vacation.

17th. That the proceedings were not duly continued to the 30th October, that day being also a day in vacation.

19th. That it does not appear to what particular 16th April, or 22nd May, or 30th October the proceedings were continued, inasmuch as it is not stated that those days were the 16th April, the 22nd May, and the 30th October in any particular year.

21st. That although it is in and by the said record stated and alleged as follows, viz. "And the said Barnard Gregory having withdrawn his plea by him above pleaded in manner and form aforesaid, our said Lady the Queen remaineth against him, the said Barnard Gregory, without defence in this behalf," yet such statement and allegation does not sufficiently allege or show that the said Barnard Gregory had in truth and in fact withdrawn his said plea, but supposes and assumes that he had so done; nor is it in any part of the said record directly, positively, or sufficiently stated, alleged, or shown that the said Barnard Gregory had with-

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The case first came on for argument in the sittings after Trinity Term, 1848. (g)

After that argument the case was directed to stand over, that the form of the entry of *retraxit* and of the judgment might be amended. The case again came before the court on November 28, 1845, before Parke, B., Maule, J., Rolfe, B., Platt, B., Williams, J., and Talfourd, J. In the meantime the judgment had been amended; and instead of a general judgment, for the offences by the indictment charged against him, the entry was of a judgment of imprisonment "for and in respect of the offences charged upon him in and by each and every count of the said indictment."

Peacock objected that the amendment which had been made did not remove the objection as to the entry of the sentence.

Henniker, contra.—The entry of the judgment has been amended by the judgment rule. The sentence of imprisonment, "for the offences charged in each and every count," means for each offence, not for all collectively.

Peacock, in reply.—The entry of the *retraxit* has not been amended. [PARKE, B.—Is there any authority to show that this is the wrong form of entering it?] The fact of not pleading does not amount to a confession.

ROLFE, B.—The withdrawal of the plea of not guilty is, in effect, a plea of guilty.

PARKE, B.—As to the sentence of imprisonment in the first division of the fourth class of prisoners, it would not affect the length of the imprisonment. But how can we take notice of the rules of the Secretary of State?

MAULE, J.—Is it the practice to make this order a part of the judgment?

Henniker.—It is not; and the court below gave the prosecutor leave only to alter that part of the record which they considered the entry of the judgment.

PARKE, B.—Probably this order ought not to have been entered on the record as part of the judgment, and I had hoped that that

drawn his said plea; whereas, in order to warrant the said judgment which appears from the said record to have been given, it ought to have been directly and positively stated and alleged in, and to have fully and clearly appeared by and from the said record, that the said Barnard Gregory, before the said judgment was given, had withdrawn his said plea; whereas that fact, if it appears at all from the said record, appears only by inference, and is not directly, positively or sufficiently stated or alleged in the said record.

23rd. That the judgment is general on all the counts, but some of the counts disclose no offence.

26th. That after the making, and according to and in pursuance of stat. 5 & 6 Vict. c. 22, *An Act for consolidating the Queen's Bench, Fleet, and Marshalsea Prisons, and for regulating the Queen's Prison*, and before the giving of the said judgment, to wit, on the 28th September, A.D. 1844, the then Secretary of State did make separate rules for each class of prisoners in the said Queen's Prison; and, by the said rules, did prescribe, order and direct, that no prisoner should be placed in the said first division of the said fourth class of prisoners, except by order of the judge or court before whom he should be tried; and that it does not appear, in or by the said record, that the said Barnard Gregory ever was tried, or that the said court of Queen's Bench ever had any right, power, or authority whatsoever, by the said judgment, to order, direct or adjudge that the said Barnard Gregory should be placed in the said first division of the said fourth class of prisoners in the said prison.

(g) Saturday, June 17.—Coram Wilde, C. J., Parke, B., Alderson, B., Coltman, J., Maule, J., Rolfe, B., Cresswell, J., and Platt, B. The substance of that argument is given with the subsequent argument of June, 1850.

which was not part of the judgment would have been struck out. If it is an order only, it is revocable.

MAULE, J.—The 17th section of stat. 5 & 6 Vict. c. 22, prescribes, with the assistance of the Secretary of State, what prisoners shall be within any particular class; and therefore he exceeds his power if he makes rules which make the division or class of the prisoner dependent upon the order of the judges. It seems to have been the intention of the Legislature to withdraw that power from the judges.

PARKE, B.—The Court of Queen's Bench did not mean this to be part of the sentence. It is a misprision of the officer in putting down, as part of the sentence, what was only an order of the court.

Adjournatur.

Accordingly, another rule was obtained in the Court of Queen's Bench; and the record was again amended, as to the entry of the *retrazit*, by substituting the word "withdrew" for "having withdrawn," and adding the word "whereby" before the words "our said Lady the Queen;" and the entry of the judgment as amended was as follows:—"It is considered, and adjudged and ordered by the said court here, that for and in respect of the offence charged in and by the first count of the indictment in this prosecution, he, the said Barnard Gregory, be imprisoned in the Queen's Prison for the space of six calendar months now next ensuing; and that for and in respect of the offence charged in and by the second count of the said indictment, he, the said Barnard Gregory be imprisoned in the said Queen's Prison for the space of six calendar months now next ensuing, and to be concurrent with the term or space of imprisonment before mentioned." [The judgment awarded the same concurrent term of imprisonment for the offences in each of the other counts successively.] "And the said Barnard Gregory is now here in court committed to the custody of the keeper of the said Queen's Prison, to be by him kept in safe custody, in execution of this judgment."

June 13, 1850. (h)

Peacock, for the plaintiff in error.—The indictment is bad; because there is no allegation in any of the counts that the libel was published "of and concerning" the Duke of Brunswick. It is not enough to say that the libel contained matters concerning him. If the colloquium is omitted in slander, the innuendoes are not warranted; so in libel, if the allegation that it was published concerning the prosecutor is left out. [PARKE, B.—The colloquium is not always necessary in slander: (*Smith v. Ward*, Cro. Jac. 674.)] Without it there is nothing to point out the plaintiff or prosecutor as the party meant. [PARKE, B.—The libel contained matters concerning him. WILDE, C. J.—How could they concern him unless he were the party to whom they applied?] In 4 Rep. 17 b., it is said, "if one says, without any precedent communication, that one of the servants of J. S. (he having many) is a notorious

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(h) Coram Parke, B., Alderson, B., Maule, J., Crosswell, J., Platt, B., and Talfourd, J.

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felon, here for the uncertainty of the person no action lies; and an inuendo cannot make it certain." [ALDERSON, B.—Here it is alleged that the matter was concerning, and therefore the publication was concerning him. There is no doubt upon this point]: (*Solomons v. Lawson*, 15 L. J. 253, Q. B.) The eighth count is not libellous, without an inuendo giving the words an offensive meaning; and if any count of the indictment is bad, then the general judgment of imprisonment is bad: (*O'Connell v. The Queen*, 11 Cl. & F. 155.) The amendment leaves the judgment as general as before. [MAULE, J.—Just so.]

Wordsworth and Henneker. (i)—The words alleged in the eighth count, taken in their plain and ordinary sense, are libellous; therefore no inuendo is required. The meaning is, that the Duke of Brunswick is unfit to be received into society. [ALDERSON, B.—The pinch of the libel is, that it speaks of *all* expatriated foreigner, whether good, bad, and indifferent.]

PARKE, B.—The great majority of us think that the words are libellous in themselves; that a jury would be warranted in considering that they cast an imputation upon the prosecutor.

Judgment affirmed.

GREGORY v. THE QUEEN. (j)

Criminal information for libel—Form of information—Judgment.

A criminal information for libel contained several counts. The defendant being convicted, the judgment was, that for the offences in the first count he should be imprisoned for two months then next ensuing; for the offences in the second count two months, to be computed from and after the expiration of the imprisonment on the first count; and so on. The third count was bad.

Held, that the judgment in that count must be reversed; and that the imprisonment on the fourth count would commence from the expiration of the imprisonment on the second.

A criminal information for libel in one count, discharged the publication of the following words: "we have no doubt sufficient information will be obtained for a strong case to lay before the Home Secretary, to enable that functionary to cause it to be intimated to the suspected party that his presence here can be dispensed with, as far as it may be attended with danger to himself."

Held, that the words did not support an inuendo, which alleged the meaning to be that "the prosecutor was suspected of having and had committed some crime which would bring his life into danger from the laws of England;" and that the count was bad.

THIS was a writ of error upon a judgment of the Court of Queen's Bench upon a criminal information for libel.

Judgment was entered on the record in the following terms:—

"It is considered, adjudged, and ordered by the said Court here,

(i) Mr. Wordsworth appeared for the crown upon the present argument; Mr. Henneker subsequently.

(j) See the commencement of the preceding case.

that for and in respect of the offence charged in and by the first count of the information in this prosecution, he the said Barnard Gregory be imprisoned in the Queen's Prison for the space of two calendar months now next ensuing; and that for and in respect of the offence charged in and by the second count of the said information, he the said Barnard Gregory be confined in the said prison for the further space of two calendar months, to be computed from and after the end and expiration of his imprisonment for his offence in the said first count of the said information mentioned; and that for and in respect of the offence charged in and by the third count in the said information, he the said Barnard Gregory be imprisoned in the said prison for the further space of two calendar months, to be computed from and after the end and expiration of his imprisonment for the offence in the second count of the said information mentioned; and that for and in respect of the offence charged in and by the fourth count of the said information, he the said Barnard Gregory be imprisoned in the said prison for the further space of two calendar months, to be computed from and after the end and expiration of his imprisonment for his offence in the third count of the said information mentioned."

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The third count of the information was as follows:—And the said coroner and attorney of our said Lady the Queen, who prosecutes in this behalf, further gives the court here to understand and be informed, that the said Barnard Gregory, for contriving and wickedly and maliciously intending, as last aforesaid, on the 19th day of March, in the year of the reign aforesaid, with force and arms, at the parish of St. Mary-le-Strand aforesaid, in the county aforesaid, unlawfully, wickedly and maliciously did conspire, print and publish, and cause and procure to be composed, printed, and published in a certain newspaper called *The Satirist, or the Censor of the Times*, a certain or false, scandalous, malicious and defamatory libel, of and concerning the said Charles Frederick Augustus William, Duke of Brunswick and Lunenburg, which said last-mentioned libel was and is as follows: (*i. e.*) "Again we repeat our thanks to observe the evidence to facts in relation to the particular subject alluded to in procuring, and we have no doubt sufficient information will be obtained for a strong case to lay before the Home Secretary, to enable that functionary to cause it to be intimated to the suspected party (then and there meaning the said Charles Frederick Augustus William, Duke of Brunswick and Lunenburg) that his presence here can be dispensed with, as it may be attended with danger to himself," the said Barnard Gregory, thereby then and there meaning and intending to have it believed and understood that the said Charles Augustus Frederick William, Duke of Brunswick and Lunenburg, was then suspected of having committed, and had committed some crime which would bring his life into danger from the laws of England, to the great damage and scandal of the said Charles Frederick Augustus William, Duke of Brunswick and Lunenburg, to the evil example, &c.

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Peacock, for the plaintiff in error.—The third count is clearly bad. The inuendo greatly enlarges the natural meaning of the words; and if any one of the counts is bad, the judgment is bad. A judgment of imprisonment to commence *in futuro* is bad; and so is a judgment which would authorize an imprisonment from time to time at intervals. [PARKE, B.—If the first count was bad, you say the sentence could not take effect at all.] Yes. [PLATT, B.—Is there any authority for saying, that an imprisonment to commence *in futuro* might not be ordered?] I am not aware of any case expressly on the point. (*k*)

ALDERSON, B.—I think we ought not to make one.

Henniker, *contra*. [PARKE, B.—The third count is certainly bad. There is nothing in the libel to show how his life could be endangered. PLATT, B.—There is no averment that any crime had been committed of which he could be suspected.]—Then the judgment will be reversed on that count only, and the imprisonment upon the 4th count will commence from the expiration of that upon the 2nd.

PARKE, B.—Yes. That will be the effect; but we can only reverse the judgment on the 3rd count, affirming it on the others. (*l*) I think there is a provision as to the mode of reckoning imprisonment in the Bail in Error Act. (*m*)

(*k*) In *Wilkes' case*, 4 Burr. 2577, it was held that judgment of imprisonment to commence from and after the determination of an imprisonment to which he was before sentenced for another offence is good in law. In the case of *Hart v. White* (30 How. St. Tr. 1321), a similar sentence was pronounced; and in *King v. Reg.* (7 Q. B. 782, 795), the court intimated that under stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, a sentence pronounced by the judge at *Nisi Prius* that defendant be imprisoned for a term commencing from the time when he should be actually taken into custody is correct.

(*l*) Objections were made by Mr. Peacock to the other counts, but the court thought them clearly good.

(*m*) 8 & 9 Viet. c. 68, s. 3, but it does not affect the point made by Mr Peacock.

COURT OF CRIMINAL APPEAL.

June 20, 1851.

(Before POLLOCK, C. B., PARKE, B., PATTESON, J., WIGHTMAN, J., and MARTIN, B.)

REG. v. MARY HOGAN. (a)

Indictment—Desertion of illegitimate child—Intent to burthen parish.

An indictment charged that Mary Hogan, intending to injure the inhabitants of the parish of B., and unjustly to burthen them with the maintenance of her bastard, of very tender age and unable to take care of herself, unlawfully did desert the said bastard child in the said parish, without having provided any means for the support of the said child, the said child not being settled in the said parish B., as the said M. H. well knew, to the damage of the inhabitants, &c.

Held bad, for want of averments, either that the health of the child was injured, or that the defendant had the means of supporting it.

THE following case was reserved by Martin, B.

CASE.

At the last Somerset Assizes, held at Taunton, before me, Mary Hogan pleaded guilty to the two following counts of an indictment. There were other counts on which no evidence was offered, and an acquittal was taken. "The jurors aforesaid, upon their oath aforesaid, do further present that the said Mary Hogan being an evil-disposed person, and contriving and intending to injure the inhabitants of the parish of Bathwicke, in the county of Somerset, and unjustly to burthen them with the maintenance of a certain female bastard child, born of the body of her the said Mary Hogan, of very tender age, to wit, of the age of four days, and not then named, and unable to move or walk, or take care and provide for herself, or to make known her wants, on the said 18th day of January, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did abandon and desert the said female bastard child, in the said parish of Bathwicke, without having provided any means whatsoever for the support of the said child, the said child not being then and there settled in the parish of Bathwicke, as the said Mary Hogan then and there well knew, to the great damage of the inhabitants of the said parish of Bathwicke, and against the peace of our Lady the Queen, her crown and dignity.

"And the jurors, upon their oath aforesaid, do further present

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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that the said Mary Hogan, being an evil-disposed person, and contriving and intending to injure Charles Millsone, Joseph Lansdown, Joseph Fusanna, and Thomas Holt Oliver, then and there being the overseers of the poor of the said parish of Bathwicke, and unjustly to burthen them with the maintenance of a certain female bastard child, born of the body of the said Mary Hogan, of very tender age, to wit, of the age of four days, and not then named, and unable to move or walk, or take care and provide for herself, or to make known her wants, on the said 18th day of January, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did abandon and desert the said female bastard child in the parish of Bathwicke, without having provided any means whatsoever for the support of the said child, the said child not being then and there settled in the said parish of Bathwicke, as the said Mary Hogan then and there well knew, to the great damage of the said Charles Millsone, Joseph Lansdown, Joseph Fusanna, and Thomas Holt Oliver, then and there being such overseers aforesaid, and against the peace of our Lady the Queen, her crown and dignity.

“The counsel for the prisoner moved in arrest of judgment, on the ground that the two counts disclosed no offence.

“I respited the judgment and discharged the prisoner on her own recognizance to appear and receive judgment at the next assizes, reserving the case for the opinion of Her Majesty’s judges pursuant to the statute. I accordingly request their opinion.”

Phinn for the prosecution.—There is no distinction in substance between the two counts; and the indictment has been preferred not so much for the purpose of punishing this defendant, as for the purpose of bringing the state of the law under the notice of the judges of the legislature. The stat. 5 Geo. 4, c. 83, s. 4, had provided a remedy in the case of the desertion of legitimate children, by enacting, that every person running and leaving his or her family chargeable, or whereby it shall become chargeable to any parish, shall be deemed a rogue and vagabond, and liable to be imprisoned with hard labour for three months; but upon the construction of that statute Mr. Justice Wightman, in *R. v. Maude* (11 L. J. 120, M. C.; 6 Jur. 646; 2 Dowl. N. S. 58), held that that statute applied to *legitimate children* only, and refused to grant a *mandamus* requiring justices to hear and determine a complaint against a single woman, who had deserted her bastard child and left it chargeable to the parish. The question therefore is, whether this is not an offence at common law. In *R. v. Renshaw* (2 Cox C. C. 285), the indictment was similar to the present; but the defendant was acquitted on the ground that the evidence did not prove an intention to burthen the parish. (*b*) *R. v. Warne* (1 Stra. 644), is

(*b*) *R. v. Renshaw*: Parke, B., in summing up, said:—“The prisoner is charged with misdemeanor in an indictment containing several counts, I think that upon the evidence you may as well confine your contention to the first, which charges an abandonment of the child without sufficient food or clothing, and with an intention that the child might die. In law every-body is presumed to intend that which is the natural consequence of his actions. If here the

very shortly reported thus: "Indictment for taking a bastard child born out of the parish of A. and bringing it into that parish, and there keeping it privately without notice to the churchwardens, and with intent to charge the parish. The court quashed the indictment, because it appeared the parish could not be burthened, the bastard being born out of the parish of A." The reason for that decision is certainly not a very good one; because, no doubt, the parish might be burthened with the maintenance of the child as casual poor. [PATTESON, J.—Yes; the parish might have been burthened *ad interim* at all events.] *R. v. Cooper* (1 Den. 460), is the only remaining case on the subject. There the indictment charged A. with unlawfully leaving a child, a month old, of which she had the care, in a highway in the parish of B. with intent to burthen the said parish with the maintenance of the said child, and it was held bad because it did not allege either that the child was not settled in the parish, or that it had sustained any injury. Of the defects there pointed out, the former was supplied in this case but not the latter. There are, however, some ancient precedents very nearly the same as this. In 2 Chitty's Crim. Law, 700, there is a form of indictment for misdemeanor at common law in lodging an inmate who was delivered of a bastard child, which became chargeable to the liberty; and in 4 Went. 353, another form for bringing a person into a parish, in which he had no settlement, and in which he soon afterwards died, whereby the parish was put to expense. It was said that there ought to have been an averment that the defendant had the means of supporting her child, but the offence does not depend upon that. The abandonment of the child with intent to burthen the parish is the gravamen of the offence.

No counsel appeared for the prisoner.

POLLOCK, C. B.—We are all of opinion that this indictment cannot be sustained. No doubt, to neglect a child so as to injure its health is an offence in the person whose duty it is to take care of it; but here there is no allegation of any injury to the child, nor that the mother had the means of supporting it. As to the supposed injury to the parish, we are not disposed to go beyond the authorities, and there is no authority for saying that any person is indictable who occasions loss to a parish by throwing

child had died, its death being the natural consequence of its exposure, then the prisoner, if guilty of so exposing it, would have been guilty of murder. With regard to the second count of the indictment, it is suggested to me, upon the authority of certain precedents, that the offence charged in it is indictable. It will be unnecessary to consider whether that be so, because, upon the evidence there is nothing to support the count. There is no ground for imputing any intention to burthen the parish. Had there been such an intention, the child would have been placed in a position where it was likely to come to the knowledge of the overseers or other parish officers. At all events, the natural course in order to throw such a burthen upon a parish would be, to place the infant in some public spot where it might easily be found, not in a retired place where it was likely to escape observation. There were no marks of violence on the child, and it does not appear in the result that the child actually experienced any injury or inconvenience, as it was providentially found soon after it was exposed; and therefore although it is said in some of the books that an exposure to the inclemency of the weather may amount to an assault, yet if that be so at all, it can only be when the person exposed suffers a hurt or injury of some kind or other from the exposure."

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upon it the maintenance of a child as casual poor. It is quite consistent with every allegation in this indictment, that the mother, being unable to maintain the child, left it for a moment, so that it might fall into the hands of those who could, and were bound to, take care of it.

PARKE, B.—I am entirely of the same opinion. Irrespectively of the intention to burthen the parish, it is quite clear that the mere act of deserting a child unable to take care of itself is not an indictable offence, unless it be followed by some injury to the health of the child. Then, as to the intention to burthen the parish, the indictment is defective, because there is no averment that the mother had any means of supplying it with nourishment; and if she was unable to carry it to its place of settlement, as might well be, it would be quite consistent with her duty to leave it to be maintained by the parish as casual poor; and any allegation in the indictment is consistent with such a state of facts.

PATTESON, J.—Mr. Phinn puts the case upon the abandonment of the child; but what can that signify to the parish? If the mother had not the means of supporting it, the parish must have maintained it as casual poor for the time, whether it was abandoned or not.

WIGHTMAN, J., and MARTIN, B., concurred.

PARKE, B., observed, that the statute 11 & 12 Vict. c. 78, s. 1, does not authorize the judge to discharge the prisoner on his or her own recognizance alone. One or two sufficient sureties ought to be required.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

May 3, 1851.(Before LORD CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J.,
PLATT, B., and TALFOURD, J.)

REG. v. SAMUEL HILL. (a)

*Evidence—Lunatic—Monomania.**A lunatic is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath and to be capable of giving a correct account of the matters which he has seen or heard in reference to the question at issue.**Whether he have such sufficient understanding is a question to be determined by the judge at the trial, upon examination of the lunatic himself, and any competent witnesses who can speak to the nature and extent of his insanity.*

IN this case the prisoner had been tried before Coleridge, J., at the February Session of the Central Criminal Court, and convicted of the manslaughter of Moses James Barnes, subject to the opinion of the judges upon a point reserved at the trial. The case was thus stated by the learned judge:—

CASE.

This prisoner was tried before me, assisted by my brother Cresswell, at the last February Sittings of the Central Criminal Court, for the manslaughter of Moses James Barnes. He was convicted, but a question was reserved for the opinion of the Court of Appeal as to the propriety of having admitted a witness of the name of Richard Donelly on the part of the prosecution.

The deceased and the witness were both lunatic patients in Mr. Armstrong's Asylum, at Camberwell, at the time of the supposed injury, and they were at that time placed in a ward called the infirmary. It appeared that a single sane attendant (the prisoner) had the charge of this ward, in which as many as nine patients slept, and that he was assisted by three of the patients, of whom the witness Donelly was one.

It was opened for the prosecution that the witness Donelly was to be called; and therefore on both sides some evidence was gone into in the course of the case, and before he was called, in order to found and to meet the objection to his competency. Muncaster, who had been an attendant in charge of the infirmary ward before the prisoner, stated thus:—"Donelly labours under the delusion

(a) Reported by P. PARNELL, Esq., Barrister-at-Law.

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that he has a number of spirits about him, which are continually talking to him; that is his only delusion; he has never been free from it, to my knowledge, since I have known him." Joseph Stuart Burton, the medical superintendent, stated the same, but added, "I believe him to be quite capable of giving an account of any transaction that happened before his eyes. I have always found him so; it is solely with reference to the delusion about the spirits that I attribute to him being a lunatic. When I have had conversation with him on ordinary subjects, I have found him perfectly rational; but for his delusion I have seen nothing in his conduct or demeanour in answering questions otherwise than the demeanour of a sane man."

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James Hill, a Doctor in Medicine, who had been formerly medical superintendent at the same asylum, stated—"The memory of an insane man is not necessarily affected; it frequently is, but frequently is not. I have seen Dr. Haslam's work. I do not agree with his remark that memory appears to be perfectly defective in all cases of insanity; certainly not, it may probably be so in the generality of cases. Madness is commonly accompanied by a great deal of excitability of the brain; but in some cases it is not. It is very often accompanied by physical irritation of the brain. That is one of the most common causes of madness, either primarily or secondarily. In certain cases of acute madness, the ideas in the mind of a madman succeed each other more rapidly than in the mind of a sane man, and in a more confused manner; that is, where there is actual irritation of the brain. It is quite possible for a man to entertain a delusion on one subject without its affecting his mind generally on other subjects. In most cases where a delusion prevails, and the man is mad, the rest of his mind is affected to some extent. I agree with Dr. Pritchard that, in monomania, the mind is unsound; but unsound on one point only. There is no doubt, however, that all the mental faculties are more or less affected; but the affection is more strongly manifested in some than in others. It is difficult to ascertain, without strict inquiry, the extent of a madman's delusions; they have sometimes the power of concealing their delusions even from their medical attendants, especially after having been frequently conversed with about the delusion, and knowing that the delusions are the cause of their detention; but it is unfrequent. It is a doubtful point whether what they say is not for a particular purpose; for instance, to obtain liberty. If a madman has an object to answer, he is sometimes capable of concealing his delusions. I have known it, but not as a general rule. They are, probably, capable of a good deal of dissimulation; many are, I know, but many do not exhibit that tendency. It is common for a certain class of madmen to exhibit a great deal of cunning. Donnelly labours under a delusion with respect to spirits. He is, in the strict sense of the word, a lunatic; inasmuch as he labours under a delusion; he is not excitable by any means. I have known instances of lunatics concealing their delusions; but in all

these cases there is an evident and apparent motive. I have known decided lunatics (not monomaniacs) in what are called lucid intervals, capable of going about and managing their own affairs; in ordinary cases there is no particular difference between a monomaniac, apart from his particular delusion, and an insane person in a lucid interval. In the instance of a monomaniac, you produce the insanity the moment you touch the particular chord; it is possible that you might revive insanity in a madman during a lucid interval by touching on the same subject, if it is but recent. I always found Donelly perfectly rational except on the subject of his particular delusion."

Donelly was then called, and, before being sworn, was examined by the prisoner's counsel. He said, "I am fully aware I have a spirit, and 20,000 of them; they are not all mine. I must inquire. I can where I am. I know which are mine. Those that ascend from my stomach and my head, and also those in my ears. I don't know how many they are. The flesh creates spirits by the palpitation of the nerves and the rheumatics; all are now in my body and round my head; they speak to me incessantly, particularly at night. That spirits are immortal I am taught by my religion from my childhood. No matter how faith goes, all live after my death, those that belong to me and those that do not. Satan lives after my death and so does the living God." After more of this kind he added, "they speak to me instantly; *they are speaking to me now*; they are not separate from me; they are round me speaking to me now; but I can't be a spirit, for I am flesh and blood. They can go in and out through walls and places which I cannot. I go to the grave; they live hereafter; I do not, unless, indeed, I've a gift different from my father and mother that I don't know. After death my spirit will ascend to Heaven or remain in Purgatory. I can prove Purgatory. I am a Roman Catholic. I attended Moorfields, Chelsea chapel, and many other chapels round London. I believe Purgatory; I am taught that in my childhood and infancy. I know what it is to take an oath. My catechism taught me from my infancy, tells me when it is lawful to swear; it is when God's honour, our own or our neighbour's good require it. When man swears he does it in justifying his neighbour on a prayer book or obligation. My ability evades me while I am speaking, for the spirit ascends to my head. When I swear I appeal to the Almighty. It is perjury, the breaking of a lawful oath or taking an unlawful one; he that does it will go to hell for all eternity."

He was then sworn, and gave a perfectly collected and rational account of a transaction which he reported himself to have witnessed. He was in some doubt as to the day of the week on which it took place, and on cross-examination said, "These creatures insist upon it it was Tuesday night, and I think it was Monday," whereupon he was asked, "Is what you have told us what the spirits told you, or what you recollected without the spirits," and he said, "No; the spirits assist me in speaking of the date. I

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thought it was Monday, and they told me it was Christmas Eve, Tuesday; but I was an eye-witness, an ocular witness to the fall to the ground.

The question for the opinion of the court is, whether this witness was competent. Sentence has not been passed, but is postponed until this question has been decided, and the prisoner remains in custody.

J. T. COLERIDGE.

April 25, 1851.

Collier for the
prisoner.

Collier, for the prisoner.—1. Donelly was, both at the time of the occurrence to which he spoke, and at the trial, *non compos mentis* in the legal, medical, and ordinary sense of the term. He was a pauper inmate of a lunatic asylum, into which he could not have been legally admitted without two medical certificates of his being “insane,” and a “fit person to be confined,” together with an order of justices adjudicating these facts, and if he had been restored to reason he must have been discharged (see stats. 8 & 9 Vict. c. 100, ss. 45, 76, and 8 & 9 Vict. c. 126, s. 51.) He was declared, by one of the medical witnesses, to be “in the strict sense of the term a lunatic,” labouring under an insane delusion, from which he was never free, and exhibited the characteristic symptoms of insanity which are said to be “a confirmed belief in an assumed idea upon which the patient is always acting, without any apparent bodily disease, to the truth of which he would pertinaciously adhere in opposition to the plainest evidence of its falsity.” (Willis on Mental Derangement, pp. 20, 21.) In *Dew v. Clarke* (3 Add. 90), Sir John Nicholl says, “The true criterion of the absence or presence of insanity I take to be, the absence or presence of what, used in a certain sense of it, is comprisable in a single term—namely, delusion. Wherever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and wherever, at the same time, having so conceived, he is incapable of being, or at least of being reasoned out of that conception; such a patient is said to be under a delusion in a particular, half-technical sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of absent or present insanity. In short, I look upon delusion, in this sense of it, and insanity, to be almost, if not altogether, convertible terms; so that a patient under a delusion, so understood, on any subject or subjects, in any degree, is for that reason essentially mad or insane on such subject or subjects, in that degree.” The same view is adopted by Lord Lyndhurst in the same case, in 5 Russ. 166, 168; by Dr. Guy, in his “Medical Jurisprudence;” and in “Taylor’s Medical Jurisprudence,” (1st edition, 627), where it is said, “In monomania, the mind is unsound; not unsound in one point only, and sound in all other respects; but this unsoundness manifests itself principally with reference to some particular object or person.” There may, indeed, be delusions of the senses without insanity; but if

the patient is aware of the delusion, or capable of being persuaded of it, he is not mad. Nor is mere false reasoning necessarily a proof of madness. Locke says, that madmen generally reason correctly, but their premises are false. An insane delusion is a false impression concerning some matter of fact, which is constantly present to the mind, and out of which it is impossible to reason the patient. Nor was Donelly, at the time of the occurrence, or at the trial, in a lucid interval. He was, in point of fact, a lunatic, without lucid intervals, for a lucid interval is a space of time "in which no symptom of delusion can be called forth" (*Wheeler v. Alderson*, 3 Hagg. Ec. Rep. 599, per Sir John Nicholl); and Donelly never ceased to be under the influence of his delusion. (See also "Haslam on Madness," 46, 47.) 2. The authorities are uniform, that, as a general proposition, a person *non compos mentis* cannot be examined as a witness, and no qualification is engrafted upon this proposition by any text-writer. In Comyn's Digest "Testmoigne," A. 1, "Who shall not be a witness," four heads are enumerated. 1. *Non compos*. 2. Infidel. 3. Person convicted of treason or felony. 4. Any infamous person. To these, interested witnesses might have been added, but all the heads of objection are resolvable into two. 1. That the witness does not know the truth. 2. That he cannot be depended upon to tell it. A person *non compos* is included under the first head, and it is said in Comyn, "A man of non-sane memory shall not be allowed as a witness, as an idiot, a lunatic during his lunacy; so one within age of discretion; so an infant who does not know the nature of an oath; but a lunatic may be a witness *in lucidis intervallis*." [ALDERSON, B.—Is not the test of a lunatic's competency the same as that of a child, viz., whether or not he understands the nature of an oath?] That test does not apply to a lunatic, for religious sentiment is compatible with the most morbid imaginations. In the authority cited, the want of knowledge of the nature of an oath is the limit imposed upon the general rule of a child's inadmissibility, but there is no such limitation to the general proposition, "a lunatic is inadmissible." The test is used with reference to a child, because it may fairly be assumed, that when the intellect of a child is sufficiently developed to apprehend abstract ideas, such as those of right and wrong, the existence of a God and an unseen world, his perceptions are sufficiently accurate, and his memory sufficiently retentive to enable him to know the truth respecting matters which he has seen or heard; nor is there reason for supposing him less capable of giving evidence on one subject than on another; a child whose intellect is so far developed is therefore reasonably considered *compos mentis*; but the lunatic is confessedly *non compos* on one subject, if not more, his perceptions or imagination being false; he therefore, on one subject at least, cannot know the truth. The same principle of exclusion of a lunatic from giving evidence, viz., want of discernment to know the truth, is adopted in Co. Litt. 6 b. 247 a, and Buller's N. P. 232, 233. No case is reported in which it has been

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expressly decided that a lunatic is not admissible, but there are several in which this has been assumed to be a settled maxim of law. In several cases a lunatic, for the purposes of testimony, has been spoken of and treated as though he were dead: (*R. v. Eriswell*, 3 T. R. 707; *Currie v. Child*, 3 Camp. 282; *Adams v. Ker*, 1 B. & P. 360; *Bennett v. Taylor*, 9 Ves. 381.) The same law is laid down with equal generality by Scotch and Irish text writers: (Alison's Practice of the Criminal Law of Scotland, p. 435, book xiii., s. 395; Gabbett's Criminal Law, vol. 2, p. 473, book ii., c. 14; Of the Evidence, tit. 1, "Incompetency arising from want of understanding.") The same rule prevails in both the civil and the canon law: (Mascardus de Probationibus Conclusio, 828, p. 373; Grotius de Jure Belli ac Pacis, lib. 2, c. 13, s. 2.) The general proposition, that a person *non compos mentis* is inadmissible as a witness, is not in any way qualified by any reported case. Parke, B., has indeed referred the court to a case (*Morley's case*) in which he admitted as a witness a person who was proved to be, to a certain extent, insane, and on referring the question to the judges, they were of opinion that the witness was rightly admitted. That case, however, was not argued, nor was any judgment pronounced. 3. It would be inconvenient, as well upon grounds of public policy as upon other grounds, to introduce a modification of the general rule. Unquestionably, the generality of the rule, which exempts a lunatic from responsibility for criminal acts, has been modified, and the question in each case has been said to be, whether or not he was able to distinguish right from wrong, with reference to the criminal act. But the exemption from responsibility for crimes is founded upon a sense of the injustice of punishing a person for doing that which he does not know to be wrong; a totally different foundation from that of the rule which excludes a lunatic from being a witness: an exception to the one is not therefore necessarily an exception to the other: (see *Dew v. Clarke*, 3 Add. 90.) It has been laid down generally, that a lunatic is incapable of filling any office, of being a member of Parliament, trustee, executor, &c.; and his liability on contracts has been limited to those which relate to necessities supplied to himself, contracts which must invariably be for his benefit. It cannot be laid down that all lunatics are admissible as witnesses, and yet, if any are admitted, it will be of the utmost difficulty to define the limits of that insanity which shall exclude. Whether the insanity extend to more than one subject, and what is *one* subject can scarcely ever be accurately ascertained. If it be said that the test should be, does the insane delusion relate to the subject-matter of the trial? it will be found that that test is wholly inapplicable. The judge cannot know what enquiries may become material in the course of any trial, or how far the enquiries made may affect the mind of the lunatic. Whether or not a witness's mind is unsound, will in most cases be ascertainable with no great difficulty, and it is more convenient, that when the fact of lunacy is established the enquiry should have an end, than that the judge should proceed

to investigate whether or not the lunacy is likely to affect something which he cannot know, viz., the evidence which the witness is to give at the trial. Such an investigation into the nature and extent of the mental unsoundness, must always be a task of great difficulty, involving a necessarily painful examination in public of the lunatic himself, possibly attended with the consequences of aggravating his malady, and always unsatisfactory, because it is impossible to test his insanity with reference to every subject which may arise. In the present case the medical evidence clearly proved the lunacy of the witness before he was called, and if the rule contended for had been adopted, he would have been spared the examination upon the subject of his delusions to which he was necessarily subjected. Again, if a lunatic witness be examined, and his credibility left to the jury, it must be permitted to call any number of witnesses to prove the extent of his lunacy, to be contradicted possibly by witnesses to his comparative sanity. Juries have always to decide upon the credibility of witnesses, but their decision on this rests on the demeanour of the witnesses, and the probability of the facts deposed to; nor are witnesses allowed to be called as to the character, habits, or modes of thought of another witness, or asked a question as to his credibility beyond this, "whether they would believe him upon his oath," whereas a conflict of witnesses as to the extent and nature of the insanity of another witness, would involve the jury in a complicated collateral question, often most difficult to determine. 4. Lastly, assuming that the generality of the rule should be qualified in any cases, the present case does not fall within any qualification of it. Here the lunatic believed himself, at the time of the trial, and frequently in converse with spirits, who proceeded from his stomach and sat in his ears, while he was occasionally visited by the spirit of the Queen, and of Luther, and others. These spirits spoke to him on the subject of the trial and differed from him as to the date of the injuries inflicted upon Barnes; a fact material to the inquiry, because part of the evidence against the prisoner was, that several days had elapsed between the commission of the injuries and his communicating them to the medical officer of the asylum, during which it was assumed that he must have become cognizant of them, and would have reported them if he had not been the person who inflicted them. Under these circumstances, there would be no probability of Donnelly being convicted of perjury if any part of his evidence was false, and although he gave answers indicating some notion of the nature of an oath in the abstract, he was practically not subject to the penalties of perjury—a protection to which the party deposed against is always entitled. It is submitted, therefore, upon general principles, as well as upon their application to the particular facts, this conviction has proceeded upon improper evidence.

Sir *F. Thesiger* (with him *Clarkson* and *Bodkin*), for the Crown, was not called upon.

LORD CAMPBELL, C. J.—I am glad this case has been reserved,

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for the matter is of great importance, and ought to be decided. However, after a very learned argument, which I have heard with a great deal of pleasure, I entertain no doubt that the rule is as was laid down by Parke, B., in the unreported case that has been referred to, that wherever a delusion of an insane character exists in any person who is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind, and sufficient understanding of the nature of an oath, for the jury to decide what amount of credit they will give to his testimony. Various authorities have been referred to, which lay down the law, that a person *non compos mentis* is not an admissible witness. But in what sense is the expression *non compos mentis* employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion, may yet be under the sanction of an oath, and capable of giving very material evidence upon the subject-matter under consideration. The just investigation of the truth requires such a course as has been pointed out to be pursued, and in the peculiar circumstances of this case, I should have adopted the course which was taken at the trial. Nothing could be stronger than the language of the medical witnesses in this case, to show that the lunatic might safely be admitted as a witness. It has been contended, that the evidence of every monomaniac must be rejected. But that rule would be found at times very inconvenient for the innocent as well as for the guilty. The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest. In a lunatic asylum, the patients are often the only witnesses to outrages upon themselves and others, and there would be impunity for offences committed in such places, if the only persons who can give information were not to be heard.

ALDERSON, B.—I quite agree that it is for the judge to say whether the person called as a witness understands the sanction of an oath, and for the jury to say whether they believe his evidence. Here the account of the lunatic himself, and the evidence of the medical witnesses, show that he was properly received as a witness.

COLERIDGE, J.—This is an important case. We have been furnished, during the argument, with rules drawn from the older authorities against the admissibility of a lunatic witness, which are stated without any qualification. It was not necessary for the decision of those cases that the rule should be qualified, and in former times the question of competency was considered upon much narrower grounds than it is at present. The evidence in this case left the matter thus; there was a disease upon the mind of the witness, operating upon particular subjects, of which the transaction of which he came to speak was not one. He was perfectly

sane upon all other things than the particular subject of his delusion. As far as memory was concerned, he was in the position of ordinary persons, and upon religious matters he was remarkably well instructed, so as to understand perfectly the nature and obligation of an oath. If it had appeared, upon his evidence, that his impressions of external objects were so tainted by his delusion that they could not be acted upon, that would have been a ground for the jury to reject or give little effect to his evidence. But this was a matter for them to determine.

PLATT, B., concurred.

TALFOURD, J.—If the proposition, that a person suffering under an insane delusion cannot be a witness, were maintained to the fullest extent, every man subject to the most innocent unreal fancy would be excluded. Martin Luther believed that he had had a personal conflict with the devil; Dr. Johnson was persuaded that he had heard his mother speak to him after death. In every case the judge must determine, according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case, there may be the most disastrous consequences.

Conviction affirmed.

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HOME CIRCUIT.

ESSEX SUMMER ASSIZES, 1851.

(Before ALDERSON, B.)

ANONYMOUS. (a)

Criminal Offences Act—Practice.

The 9th section of Lord Campbell's Criminal Offences Act, 14 Vict. c. 19, prohibits a previous conviction being given in evidence, or stated to the jury, until after a verdict of guilty of the subsequent offence.

Held, by ALDERSON, B., after consultation with JERVIS, C. J., that the old practice should still be pursued, of calling upon the prisoner to plead to the whole charge against him, including the previous convictions, but that when given in charge to the jury, that portion of the indictment alleging a former conviction should be omitted.

THE Clerk of Arraignment called the attention of his Lordship to the difficulty which had arisen under Lord Campbell's new act, creating various new offences, and other matters relating to criminals. It appears that, by the 9th section, it is enacted that, in all cases where a previous conviction is charged in the indictment against a prisoner, that portion of the indictment is not to be read until after the jury shall have returned a verdict of guilty against the prisoner upon the principal charge. The officer of the court suggested, that if this section were to be carried out strictly, the fact of the prisoner's conviction could not in many cases be legally brought to the notice of the court at all, and he therefore wished the direction of his Lordship as to what course should be taken.

ALDERSON, B., after consulting the Chief Justice in the other court, said, that as it appeared that, if the strict letter of the section were acted up to, in many cases the prisoner never could be given in charge at all upon a previous conviction, and as this was evidently not the intention of the Legislature, they were of opinion that the old practice should be pursued, of calling upon the prisoner to plead to the whole of the charges against him, and when he was given in charge to the jury, that portion of the indictment alleging a former conviction should be omitted.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

EXCHEQUER CHAMBER.

June 20, 1851.

LAVEY v. THE QUEEN. (a)

Perjury committed in County Court—Form of indictment—Averment of jurisdiction—County Court.

An indictment for perjury averred that on, &c., in the Whitechapel County Court of Middlesex, holden at the Court-house in Osborne-street, Whitechapel, in the parish of, &c., in the County of Middlesex, before J. M., serjeant-at-law, then and there being judge of the said court, a certain action or contract then pending in the said County Court between A. L., suing as widow and executrix of H. L., plaintiff, and R. H. defendant, came on to be tried, and was then in due form of law tried and heard before the said J. M., &c., upon which trial the said A. L., &c., tendered herself as a witness on her own behalf, and was duly sworn, &c., before the said J. M., then and there being judge of the said court as aforesaid, and then and there having sufficient and competent authority to administer the said oath to her, &c.

Held, after verdict upon writ of error, 1st, that the court was sufficiently designated as a court held under stat. 9 & 10 Vict. c. 95; and 2ndly, that although there was no express averment that the oath was administered in a judicial proceeding over which the court had jurisdiction, that averment was by necessary intendment involved in the allegation, that the judge had sufficient authority to administer the said oath.

ERROR from the Court of Queen's Bench upon a judgment of imprisonment passed by Lord Campbell at Nisi Prius, upon the following indictment, which had been removed by *certiorari*:

Central Criminal Court (to wit.)—The jurors for our Lady the Queen, upon their oath present, that heretofore and at the time of the committing of the offence hereinafter mentioned (to wit), on the ninth day of April, in the year of our Lord, 1850, in the Whitechapel County Court of Middlesex, holden at the Court-house, in Osborne-street, Whitechapel, in the parish of St. Mary, Whitechapel, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, before James Manning, serjeant-at-law, the other being the judge of the said court, a certain action on contract then pending in the said County Court between Ann Lavey, suing as widow and executrix of the last will and testament of Hyam Lavey, deceased, plaintiff, and

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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Robert Hannah, defendant, came on to be tried, and was then and there, in due form of law, heard and tried by and before the said James Manning, then and there being judge of the said County Court, as aforesaid, upon which said hearing and trial the said Ann Lavey, of the parish of St. Paul, Shadwell, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, widow, appeared and tendered herself as a witness on her own behalf, and was then and there, within the jurisdiction of the said Central Criminal Court, duly sworn, and took her corporal oath before the said James Manning, then and there being judge of the said court, as aforesaid, and then and there having sufficient and competent authority to administer the said oath to her the said Ann Lavey in that behalf, that the evidence which she the said Ann Lavey should give to the court then and there touching the matter then and there in question, between her, the said Ann Lavey and the said Robert Hannah, should be the truth, the whole truth, and nothing but the truth. And the jurors aforesaid upon their oath aforesaid, do further present, that, at and upon the hearing and trial of the said action as aforesaid, it then and there became and was a material question in the said action whether she, the said Ann Lavey, had ever been tried at the said Central Criminal Court for any offence whatever, and whether the said Ann Lavey had ever been in custody at the Thames Police Station in Stepney, in the said county of Middlesex, charged with any offence whatever; and the jurors aforesaid, upon their oath aforesaid, do further present that the said Ann Lavey, being so duly sworn as aforesaid, and not having the fear of God before her eyes, nor regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to prevent the due course of law and justice, and unjustly to oppress and aggrieve the said Robert Hannah, and to subject him to the payment of divers large sums of money, and sundry costs, charges and expenses, then and there and within the jurisdiction of the said Central Criminal Court, on the said hearing and trial of the said action, upon her oath aforesaid, falsely, corruptly, knowingly, wilfully and maliciously before the said James Manning, then and there being such judge of the said County Court as aforesaid, did depose and swear, and amongst other things in substance and to the effect following, that is to say, that she, the said Ann Lavey, never had been tried at the Central Criminal Court on an indictment for having feloniously uttered a forged indorsement to a certain bill of exchange, well knowing it to have been forged, and with intent to defraud one Adolphus Brandt and another; and that the said Ann Lavey had never been tried at the said Central Criminal Court for any offence whatever, and that she, the said Ann Lavey, had never been in custody at the Thames Police Station in Stepney, in the said county of Middlesex, charged with having uttered the said forged indorsement as aforesaid, and that the said Ann Lavey had never been in custody at the said Thames Police Station, charged with

any offence whatever. Whereas, in truth and in fact, the said Ann Lavey was, to wit, at a session of the Central Criminal Court, held on the 21st day of August, in the year of our Lord, 1843, tried in due form of law for a certain offence, on an indictment for having feloniously uttered a forged indorsement to a certain bill of exchange, well knowing it to have been forged, with intent to defraud one Adolphus Brandt and another; and whereas also, in truth and in fact, the said Ann Lavey was, to wit, on the 21st day of August, in the year of our Lord, 1843, in custody at the Thames Police Station aforesaid, charged with a certain offence, to wit, with having obtained, by means of a forged note, the sum of one pound five shillings, with intent to defraud Thomas Yates. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Ann Lavey, on the said ninth day of April, in the year of our Lord, 1850, at the Whitechapel County Court of Middlesex, aforesaid, at the parish aforesaid, and within the jurisdiction of the said Central Criminal Court, before the said James Manning, then and there being such judge of the said County Court as aforesaid, and having such power and authority as aforesaid, by her own act and consent, and of her own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully and corruptly did commit wilful and corrupt perjury, to the great displeasure, &c.

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The following points were stated for argument:—

1st. That it does not appear from the indictment that there ever was such a court as the supposed court therein described as the Whitechapel County Court of Middlesex, or that such court was ever lawfully created or established under statute 9 & 10 Vict. c. 95, or ever lawfully existed, nor does it appear from the indictment whether that court was a court of record or not of record, or that the same court had any jurisdiction to hold plea of or try the action on contract mentioned in the indictment.

2ndly. That it does not appear from the said indictment that the cause of action for which the action on contract in the said indictment mentioned was commenced in the said Whitechapel County Court of Middlesex, arose or occurred within the jurisdiction of that court, or was a cause of action over or in respect of which that court had jurisdiction, or that the sum sought to be recovered by the said action did not exceed 20*l.*, or was of such an amount as to be recoverable in that court; and it is in the said indictment alleged that Ann Lavey sued in the said action as widow and executrix of the last will and testament of Hyam Lavey, deceased, whereas the said Ann Lavey could not by law maintain any action on contract in the capacity of or as such widow and executrix.

3rdly. That it appears from the indictment that some issue or matter of fact in the said action came on to be tried by and before James Manning, in the said indictment mentioned, and that the said Ann Lavey tendered herself as a witness on her own behalf, but it does not appear from the said indictment that the said

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James Manning had any power or authority to try such issue or matter of fact, or that the said Ann Lavey could lawfully be sworn or examined as a witness on her own behalf, in a cause in which she was the plaintiff.

4thly. That though the indictment states that Ann Lavey was duly sworn, and took her corporal oath before the said James Manning, that the evidence which she should give should be such as in the said indictment in that behalf mentioned; yet the said indictment does not state that the said Ann Lavey took her corporal oath, or was sworn upon the Holy Gospel of God, or in any other manner.

5thly. That it does not sufficiently appear from the indictment whether the evidence to which the said Ann Lavey was sworn, as in the indictment mentioned, was to be given by her in the said Whitechapel County Court of Middlesex, or in the Central Criminal Court, in the said indictment mentioned, nor does the said indictment sufficiently show of which of those two courts James Manning, in the said indictment mentioned, was the judge.

6thly. That the indictment alleges that Ann Lavey was sworn and took her corporal oath, as therein mentioned, with respect to the evidence which she should give to the court therein in that behalf mentioned, but the evidence upon which the perjury is assigned, as in the indictment alleged to have been given before James Manning, and the indictment does not allege James Manning to have been the court to which was to be given the evidence with respect to which Ann Lavey was sworn, as in the said indictment mentioned, and it does not sufficiently appear from the said indictment to which of the two courts therein mentioned Ann Lavey was to give the evidence with respect to which she was sworn, as in the indictment mentioned.

7thly. That the indictment does not sufficiently allege or show the materiality of the evidence upon which the perjury is assigned to or with reference to the question or matter to be tried, or that it was material with reference to the question or matter to be tried that the averments and statements introduced into and contained in the said indictment for the purpose of showing the materiality of the evidence upon which the perjury is assigned, are not sufficient for that purpose, and that it is consistent with the said indictment that the evidence upon which the perjury is therein assigned was wholly immaterial, and was evidence upon which perjury could not properly be assigned. That the indictment contains the following allegation, that is to say, "And the jurors aforesaid, upon their oath aforesaid, do further present, that, at and upon the hearing and trial of the said action as aforesaid, it then and there became and was a material question in the said action." And such allegation is immediately followed by a statement of divers matters, and it does not appear from the said indictment to which of those matters that allegation applies or relates.

8thly. That the indictment ought to have concluded *contra formam statuti*.

This case was argued on Wednesday, June 18, by *Willes*, for the plaintiff in error; *Prendergast*, contra.

Authorities cited: *R. v. Ewington*, 1 Car. & M. 319; *R. v. Overton*, 4 Q. B. 83; *Ryalls v. The Queen*, 18 L. J. 69, M. C.; 3 Inst. 166; *Redham v. Waters*, Salk. 269.

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Cur. adv. vult.

JUDGMENT.

PARKE, B.—In this case I have now to deliver the judgment of the court. It was an indictment for perjury committed in the County Court, and the averment is, “that in the Whitechapel County Court of Middlesex, holden at the court-house in Osborne-street, Whitechapel, in the parish of St. Mary, Whitechapel, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, before James Manning, Serjeant-at-law, then and there being the judge of the said court, a certain action on contract then pending in the said County Court between Ann Lavey, suing as widow and executrix of the last will and testament of Hyam Lavey, deceased, plaintiff, and Robert Hannah, defendant, came on to be tried, and was then and there in due form of law heard and tried by and before the said James Manning, then and there being judge of the said County Court as aforesaid, upon which said hearing and trial the said Ann Lavey, of the parish of St. Paul, Shadwell, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, widow, appeared and tendered herself as a witness on her own behalf, and was then and there within the jurisdiction of the said Central Criminal Court duly sworn, and took her corporal oath before the said James Manning, then and there being judge of the said court as aforesaid, and then and there having sufficient and competent authority to administer the said oath to her the said Ann Lavey in that behalf, that the evidence which she the said Ann Lavey should give to the court then and there touching the matter then and there in question between her the said Ann Lavey and the said Robert Hannah, should be the truth, the whole truth, and nothing but the truth.” Then they set out the evidence, and aver that the question was material, and that what she swore in answer thereto was false. She pleaded not guilty, and sentence was passed at Nisi Prius of twelve months’ imprisonment, on which she has brought a writ of error. Two objections were stated to this indictment. The first was, that the court in which the proceeding took place, in the course of which the perjury was committed, was not properly described. We intimated our opinion in the course of the argument that that objection ought not to prevail. We think it does sufficiently appear that the court was held in pursuance of the 9 & 10 Vict. c. 94, as it is alleged to have been a County Court, and held before a single judge. The second objection was, that there was no averment that the action of contract stated in the indictment was one over which the County Court had jurisdiction; and further, that no intendment can be made in favour of an inferior court that the action pending in it

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was one over which the court had jurisdiction. If it had not, then perjury could not have been committed in giving evidence in that case. For the Crown it was contended that the court might have authority to put the question, and have it answered, although it had no jurisdiction over the case; but that, even assuming that it was necessary that the suit should be one for a cause of action cognizable in a County Court, in order to render the witness liable to an indictment for perjury, there was a sufficient averment that it was such a suit involved in the averment that the judge had sufficient and competent authority to administer the said oath, for he would have no such authority (on the supposition that it was necessary that he should have jurisdiction over the suit, in order to make the oath binding), unless that very oath was administered in the course of such a suit; and that the meaning of the averment of authority to administer the oath was that it was administered by such a person in such a proceeding as to make that oath valid and binding. For the plaintiff in error, Mr. Willes argued that it was not enough to make that averment, but that the statute 23 Geo. 2, c. 11, s. 1, required something more; and that in setting forth the substance of the offence it was not enough to set out the substance of the matter sworn to, and to aver that it was false, and the authority of the judge to administer the oath, and to show expressly, or by implication, that the matter deposed to was material; but that it must be shown by an independent averment that the oath was administered in a judicial proceeding, of which the court had cognizance, including in that term all proceedings in which wilful perjury is committed by a false oath, because there were several judicial proceedings which are meant to be comprised under that term, commissions of inquiry from the Crown, and others; and for that the judgment of the Court of Queen's Bench delivered by Lord Denman, 4 Q. B. 83 (*Reg. v. Overton*), was cited. If it were necessary for us to say how we should decide the present case, if it were not distinguishable from that, we should require further consideration; but in this case it is expressly averred that an action was pending in that court, presided over by the judge who administered the oath, and that such action was one of contract, a species of action of which the court may have cognizance; that the case came on to be tried before him; that the plaintiff in error was examined as a witness upon the hearing, and sworn by the judge; and then follows the averment of a competence of authority in that judge to administer the oath. It appears, therefore, on the present record, that the oath was administered in the course of a judicial proceeding, whereas, in the case of *Reg. v. Overton*, the court considered that there was no averment that the oath was administered in the course of any judicial proceeding; here the alleged defect is, that although it was administered in a judicial proceeding, it does not appear expressly that it was one over which the judge who administered it had cognizance. We think it does so appear by necessary implication, for unless he had, he could not have had power to

administer the said oath so as to be valid and binding, which is the true meaning of it. We, therefore, think, that in this case the alleged defect in the averment of the substance of the charge is supplied by necessary implication, by the averment of the competency of authority in the judge to administer the oath; and we must infer that it was proved at the trial that he had lawful jurisdiction over the proceedings, and there was a sufficient averment in the indictment that the matter deposed to was material; therefore, the judgment must be affirmed.

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Judgment affirmed.

CENTRAL CRIMINAL COURT.

OCTOBER SESSION, 1850.

October 24.

(Before Mr. JUSTICE ERLE.)

REG. v. MIDDLESHIP. (a)

Manslaughter—Negligence.

On the trial of an indictment against a woman for the manslaughter of her new-born child the evidence went to prove that the child had dropped from her whilst she was on the privy, and that it had been smothered in the soil. Held, that if the jury were of opinion that after it had been born the mother had the power of procuring such assistance as might have saved the child's life, and she neglected to procure it, she was guilty of manslaughter.

THE prisoner was indicted for feloniously killing and slaying her new-born child. It appeared in evidence that the prisoner, who was seventeen years of age, had been delivered of a child whilst on the seat of the privy. The surgeon was clearly of opinion that the child had breathed, but he could not say for what period, nor was there any evidence from which he could infer whether or not the mother was conscious of having been delivered. It was proved, however, that she was subject to epileptic fits, and that this was her first child.

ERLE, J. (to the jury).—This is a charge of manslaughter of a very peculiar character. Our law casts upon certain persons the duty of affording protection and sustenance to others who may be subjected to their control. Masters are bound to provide for

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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their apprentices; parents are bound to take care of and sustain their children, and if, in consequence of their failing to perform these duties, death ensues, it is murder or manslaughter in the master or the parent, according to circumstances. The question in this case for you will be whether there was any negligence on the part of the mother in not providing for the safety of her offspring. It is but reasonable to presume, from the evidence, that the child dropped from her whilst she was on the privy. Now, if you think that she had the means and the power of procuring such assistance as might have saved the life of the child, by neglecting to do so she would be clearly guilty of the crime of manslaughter. But it is proper that you should take into your consideration that the prisoner is very young; that this was her first child; that she was subject to epileptic fits; and that the probability is that the child could have survived but a very few moments after its immersion in the soil. All these circumstances have a tendency to disprove culpable negligence, and unless you believe that such negligence did exist, you must acquit the prisoner.

Verdict, Not Guilty.

Robinson, for the prosecution.
Huddleston, for the defence.

CENTRAL CRIMINAL COURT.

NOVEMBER SESSION, 1850.

December 2.

(Before Mr. COMMISSIONER GURNEY.)

REG. v. MATTHESON AND POTTS. (a)

Larceny—Taking—Trespass—Bailment.

The prisoners were tenants and occupiers of a house in which were certain gas fittings belonging to a public company. It became necessary that a gas meter should be changed, and the old one was taken down and left in the custody of the prisoners till called for by the company's servant. In the mean time they converted it to their use. Held, that they could not be convicted of larceny.

THE prisoners were indicted for larceny. It appeared in evidence that they were tenants and occupiers of a house in which there was a gas meter belonging to a chartered gas com-

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

pany. It being necessary that a new meter should be put up, the old one was taken down, and Mattheson was told that it had better remain in the kitchen until it was called for by a servant of the company. Shortly afterwards the prisoners were found disposing of the old meter.

O'Brien (for the prisoners), submitted that under these circumstances they could not be convicted of larceny. They had lawful possession of the meter; it was left in their custody, and there was, therefore, no trespass on their part in disposing of it.

Huddleston (for the prosecution), contended that it was a question for the jury whether the prisoners had not induced the company to take the old meter down that they might appropriate it to themselves, and if that were so it would be clearly a larceny subsequently to dispose of it. The meter was at first a fixture in the house, but the moment it was taken down the property in it reverted in the company, and the converting it would amount to the offence charged.

Mr. COMMISSIONER GURNEY (after consulting the Common Serjeant.)—I had a very strong opinion that this charge could not be sustained before I consulted the Common Serjeant, and he quite agrees with me that upon this evidence the prisoners must be acquitted. The possession of the meter was lawful on their part, and, therefore, there was no felony in the taking.

Not Guilty.

Huddleston, for the prosecution.

O'Brien, for the prisoners.

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JANUARY SESSION, 1851.

January 11.

(Before PATTESON, J., and TALFOURD, J.)

REG. v. PRICE. (a)

9 Geo. 4, c. 69, s. 2—*Night poaching—Resisting lawful apprehension.*

The gamekeeper of a person who has merely the right of shooting over land is not justified in apprehending a person unlawfully being upon such land by night, for the purpose of taking game.

THE prisoner was indicted for feloniously cutting and wounding the prosecutor with intent to resist his lawful apprehension, and in another count for wounding with intent to do grievous bodily harm.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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It appeared that the prosecutor was gamekeeper to a Mr. Day, who rented the shooting over certain land. The gamekeeper was watching on the land at night, when he found the prisoner, with several others, there in pursuit of game. He endeavoured to apprehend him, when the prisoner resisted, and severely wounded him.

Charnock, for the prisoner, contended that the defendant could not be convicted on the 1st count; the prosecutors had no authority to apprehend him. The stat. 9 Geo. 4, c. 69, s. 2, did not apply to a case where the person apprehending was gamekeeper to one who merely had the right of shooting over the land without being the owner or occupier of the land itself.

PATTESON, J.—I do not think that the evidence is sufficient to support the 1st count. The act 9 Geo. 4, c. 69, s. 2, declares that “Where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land or for any person having a right or reputed right of free warren or free chase therein, or for the lord of the manor or reputed manor wherein such land may be situate; and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant to seize and apprehend such offender on such land,” &c. Now Mr. Day is neither the owner nor the occupier of the land in question, and therefore his gamekeeper had no authority under the act to apprehend the defendant. *In R. v. Addis* (6 C. & P. 388) it was held that the gamekeeper of a person who had no interest in the land in question, but who had a mere permission from the owner of the land to preserve the game there, had no right to apprehend within this section. I think, therefore, the 1st count cannot be supported.

TALFOURD, J., concurred.

Verdict, Guilty of assault.

Platt, for the prosecution.

Charnock, for the prisoner.

CENTRAL CRIMINAL COURT.

FEBRUARY SESSION, 1851.

February 5.

(Before COLERIDGE, J., and CRESSWELL, J.)

REG. v. S— AND WIFE. (a)

*Master and servant—Supplying food and nourishment to servant—
Infant.**A girl of sixteen years of age is not an infant of tender years, and therefore her master and mistress, who have not kept her under duress, are not guilty of a misdemeanor in not supplying her with sufficient food and nourishment, whilst in their service.*

THE defendants were charged upon the following indictment:—
 Central Criminal Court, to wit.—The jurors for our Lady the Queen, upon their oath present, that heretofore and before the committing of the offence hereinafter in this count mentioned, one J. W., an infant of tender years, to wit of the age of fifteen years, being an inmate of the workhouse of the West London Union, and a pauper chargeable to the said Union, was, with the consent and sanction and by the direction and authority of the guardians of the poor of the said Union, placed with and under the care and control of one G. S., and of T. the wife of the said G. S., at their request, to serve them the said G. S., and the said T. the wife of the said G. S., as a servant; and that it then and there, thereafter, and at the time of the committing of the offence hereinafter mentioned, became and was the duty of the said G. S., and of the said T. the wife of the said G. S., to provide, furnish, supply, and give to the said J. W., then being such servant as aforesaid, wholesome and sufficient meat, drink and food for the sustenance, support and nourishment of the said J. W., while and during the time when she was in their service, and also during the said period to permit the said J. W. to have and to take wholesome and sufficient meat, drink, and food as aforesaid. And the jurors, upon their oath aforesaid, do further present that the said G. S., late of the Middle Temple in the city of London, gentleman, and T. the wife of the said G. S., late of the same place, unlawfully and intending to hurt and injure the said J. W. heretofore, to wit, on the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and fifty, and on divers other days and times, as well before as after that day with force and arms, in the city of London afore-

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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said, and within the jurisdiction of the Central Criminal Court, unlawfully, wilfully, maliciously, and contrary to their said duty in that behalf, while the said J. W. was in their service as aforesaid, and the said J. W. was such infant as aforesaid, did omit, neglect, and refuse to provide, furnish, supply, or give wholesome or sufficient meat, drink, or food for the sustenance, support, and nourishment of the said J. W., and to permit the said J. W. to have and to take sufficient meat, drink, or food as aforesaid, contrary to the duty of them the said G. S., and T. the wife of the said G. S., by reason of which said premises the said J. W. then became and was, and for a long space of time, to wit for six months then next following, continued to be very weak, sick, and ill, and greatly consumed and emaciated in her body, to the great damage of the said J. W., to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Indictment.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore, and before the committing of the offence hereinafter in this count mentioned, one J. W., an infant of tender years, to wit, of the age of fifteen years, being an inmate of the workhouse of the West London Union, and a pauper chargeable to the said union, was, with the consent and sanction, and by the direction and authority of the guardians of the poor of the said union, placed with and under the care and control of one G. S., and of T. the wife of the said G. S., at their request to serve them the said G. S., and the said T. the wife of the said G. S., as a servant, and that it then and there, thereafter, and at the time of the committing of the offence hereinafter mentioned, became and was the duty of the said G. S., and of the said T. the wife of the said G. S., to give to the said J. W., then being such servant as aforesaid, wholesome and sufficient meat, drink and food for the sustenance, support and nourishment of the said J. W., while and during the time when she was in their service. And the jurors aforesaid, upon their oath aforesaid, do further present that the said G. S., and the said T. the wife of the said G. S., unlawfully contriving and intending to hurt and injure the said J. W. heretofore, to wit, on the 25th day of April, in the year of our Lord one thousand eight hundred and fifty, and on divers other days and times as well before as after that day, with force and arms, in the city of London aforesaid, and within the jurisdiction of the Central Criminal Court, unlawfully, wilfully, maliciously, and contrary to their said duty in that behalf, while the said J. W. was in such service as aforesaid, and while the said J. W. was such infant as aforesaid, did omit, neglect and refuse to give wholesome or sufficient meat, drink or food for the sustenance, support and nourishment of the said J. W., contrary to the duty of them the said G. S., and T. the wife of the said G. S., by reason of which said premises the said J. W. then became and was, and for a long space of time, to wit, for six months then next following, continued to be very weak, sick and ill, and greatly consumed and emaciated

in her body, to the great damage of the said J. W., to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

There were other counts charging the defendants with a common assault.

The defendants pleaded guilty to the counts charging assaults, and not guilty to the two first counts.

M. Chambers, Q. C. (with whom was *Huddleston* for the prosecution), opened the case, and stated that the indictment as to the first two counts was founded on the principles laid down in *R. v. Ridley* (2 Camp. 650.) That was a charge against a master for not providing sufficient food for his servant, whereby the servant became injured in health. It was there held that the indictment must allege that the servant was of tender years, and under the control of the master. In the present indictment those two circumstances were alleged, and he believed that by the common law of this country it was the duty of a master to provide his servant with proper food and nourishment, and that for a breach of that duty he was subject to punishment by the criminal law. The facts of the case were these:—In July, 1849, the female

defendant applied to the West London Union for a servant, and J. W., the prosecutrix, then between fourteen and fifteen years of age, was sent to her as such servant, and remained in the service until November last. When she left the union she was in a state of good health, but shortly afterwards she was subjected to a course of ill treatment by the defendants, which was continued up to the said month of November, and by which she became so reduced and emaciated as to be a mere skeleton. Her food had been restricted in quantity, and what was given to her was of a nature totally unfit for human consumption. Her health had, in consequence, been gradually undermined, and probably a further continuance of such treatment would, in a very short time, have resulted in her death. She was an orphan; she had no friends to whom she could appeal, and was utterly without the means of procuring what it was the undoubted duty of the defendants to have furnished her with. [COLERIDGE, J.—You have said, Mr. Chambers, that these two first counts of the indictment are framed upon the principles laid down in *R. v. Ridley*. There the indictment was held defective for the want of certain allegations which this one contains. We will assume, therefore, that the indictment is good upon the face of it; but, according to your opening, the prosecutrix was between fourteen and fifteen years of age when she was taken into the service, and the ill treatment complained of continued over a period until she was between sixteen and seventeen, and it is perfectly clear that a person of that age cannot be considered as in fact of tender years. The duty of a master or mistress to supply food to a servant, is one resulting from the relation of master and servant, and we do not sit here to try people for the breach of a civil contract. It might be different if it could be shown that she was kept under duress, and prevented from

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procuring food; but, on the contrary, it does not appear that she was in any way restrained from going out.]—The question of whether or not she was of tender years is, perhaps, one for your lordship to decide. I have not been able to find any authority in which it was held that a child of such an age could be the object of an indictment. In *R. v. Ridley* the age was about fifteen.

CRESSWELL, J.—Which I take to be the reason that they did not state the child to be of tender years. A person of tender years is a person incapable of acting or judging for herself. There are cases in which very young children may act for themselves, as where a child is brought up by *habeas corpus* to be delivered into the custody of a parent; there it is allowed to make an election. Again, a child of a much earlier age than this girl may contract marriage and other relations, and the law holds such a person to be competent to act for herself, whatever injury may follow. It is impossible to suppose that this girl was not capable of acting for herself.

COLERIDGE, J.—Common sense seems to point out that this girl was capable of making some complaint if she was deprived of food.

Huddleston.—There are here two material allegations; one that the child was of tender years; and the other, that she was under the care and control of the defendants: "tender years" is a relative expression, and must be decided by the judge and the jury. The capacity and intellect of the girl must be considered. It may be that a girl of sixteen has much less capacity and intellect than another of eight or nine, and this would be a question for the jury to decide.

CRESSWELL, J.—Whether the child was under the care and control of the defendants is referrible to her years, intellect and capacity. If being of ordinary, or even superior intellect and capacity, she was so under the control of the defendants, so impressed with fear, either from being watched or being threatened, as to be unable to resort to the assistance of her natural defenders or of other persons, then a duty would devolve on the defendants greater than that arising from the civil contract.

COLERIDGE, J.—From the indictment and opening of counsel, we gather nothing to distinguish this from ordinary cases. There was no special control or imprisonment to which this girl was subjected. The control must be taken with reference to the subject-matter of the charge; here it means such control as prevented her from making complaints.

M. Chambers mentioned the case of *R. v. Waters* (Den. C. C. 356; 2 C. & R. 864.) It was a charge of murder, and the indictment alleged the death of a child to have been caused by its mother casting and throwing it on a heap of ashes and leaving it there in the open air, exposed to the cold air, whereby it died; and it was held that the indictment was good, but if it had charged the death to have been caused by mere nonfeasance in the neglect

of the prisoners' maternal duties, it would have been bad unless the child were alleged to have been of such an age or in such a situation as to be unable to take care of itself. After, however, what had fallen from the court, he should offer no evidence in support of the first two counts of the indictment.

COLERIDGE, J.—The case last quoted seems to me entirely to confirm the opinion we both entertain with regard to this indictment, and we think the course you have taken is the right one. It is to be presumed you are well acquainted with the facts you were in a condition to prove; and you have been careful not to state anything that could inflame the minds of the jury and create any undue prejudice against the defendants. You are clearly not capable of sustaining by evidence some of the material allegations in the indictment.

CRESSWELL, J.—I entirely concur in the propriety of the course adopted by Mr. Chambers. I think Mr. Huddleston's argument on the meaning of the words "tender years" goes too far. If it were to be taken as a rule, that, whether a person is of tender years or not, is to be decided by his capacity, then some mere children might, with greater propriety, be said to be of tender years than other people of thirty, because their intellects may be more mature. By the expression, "under the care and control of the defendants," was meant (for the purposes of this indictment), under such control as to be restrained from acting for herself. In its ordinary sense it means no more than such control of her master as every servant may be said to be under. The allegation that the defendants "prevented her from obtaining food" renders the definition of "tender years" unimportant, for if they actually starved her they would be responsible, whatever her age might be. But I think this girl was a free agent, and, therefore, that the defendants are not liable on the two first counts of the indictment.

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Judgment.

Verdict, Not Guilty.

Chambers, Q. C., and Huddleston, for the prosecution.

Clarkson, and Bodkin, for the defendants.

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES, 1851.

July 25.

(Before Mr. BARON MARTIN.)

REG. v. BURT AND OTHERS. (a)

Evidence—Character.

Where witnesses are called on the part of the prisoner to give evidence of his general good character, it is not competent to the prosecution to call witnesses to give evidence of the prisoner's general bad character.

THE prisoner, Henry Burt, was indicted, with other persons, for stealing from a dwelling-house, with a count charging him as a receiver.

Scotland, on the part of the prisoner, called a witness who gave evidence of the prisoner's general good character.

Huddleston, for the prosecution, proposed to give evidence of the prisoner's general bad character. [MARTIN, B.—I think you cannot do that.] He then referred to Russell on Crimes, by Greaves, page 786, where it is said, "The prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by calling witnesses in support of it; and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put in issue, but coming in collaterally;" referring in a note to Buller's Nisi Prius, p. 296, citing *Martyn v. Hind* (Cowper's Rep. p. 437), Mr. Greaves adding, "The ordinary course, however, is to ask the witness whether he has not heard that the prisoner has been tried for a particular offence." The present Recorder of London (Mr. Wortley) had allowed similar evidence to be given in a case (*Reg. v. Hart*) where the prisoner was charged with feloniously receiving indigo. He (*Huddleston*) was for the prisoner, and called a witness to character, and his learned friend, Mr. Ballantyne, was permitted to put a witness in the box to contradict him.

Scotland, for the prisoner, observed that the note of Mr. Greaves showed that he read the text as applying to the cross-examination of the witness called for the prisoner, and not as an authority for calling witnesses on the part of the prosecution. The practice, if permitted, would lead to collateral issues distinct from the guilt or innocence of the prisoner.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

MARTIN, B.—The authority cited from Russell is very old. Independently of other objections, the course would be very inconvenient in practice; you will call a witness; the counsel for the defence will have a right to address the jury on that evidence, and you will be entitled to the general reply; call your witness, however, and state the form of question you propose to put.

John Ellis, a police constable, was called and sworn. He stated that he knew the prisoner. The following question was put to him, "Does the prisoner bear a good character, or a bad character?"

MARTIN, B.—I cannot allow that question to be put to or answered by the witness.

Scotland said the counsel for the prisoner was placed in an awkward position by objecting to such evidence, and as the witness was in the box, he wished him to answer the question.

Ellis then said that the prisoner's general character was good, but he kept a lodging-house, the resort of notoriously bad characters.

The jury returned a verdict of *Not Guilty*.

On the following day (26th July),

MARTIN, B., said, "With reference to the case of Henry Burt, in which a question was yesterday raised, of whether or not after a witness had given evidence of the prisoner's good character, it was open to the counsel for the prosecution to give evidence of the prisoner's general bad character, I have consulted my brother Erle, and he agrees with me in thinking such evidence inadmissible. He says he has never known such a course pursued, and thinks it ought not to be allowed."

REG.
v.
BURT AND
OTHERS.
—
1851.
—
Evidence—
Character.

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES, 1851.

July 25.

(Before Mr. JUSTICE ERLE.)

REG. v. DUFFIELD AND OTHERS. (a)

Practice—Right of defendants to enter and try traverse.

Where an indictment for a misdemeanor has been removed by certiorari, and the defendants have entered into recognizances to appear and try the indictment, the prosecutor has a right to enter it for trial, and whichever party enters it for trial has a right to try it in its turn, as in that respect an indictment so removed has all the incidents of a civil action. Where, therefore, there were two indictments for conspiracy arising out of the same transactions, one against D. and others, and the other against R. and others, and they were entered by the prosecutor in that order, numbers "2" and "3" in the cause list, and the defendants subsequently entered the cases as Nos. "10" and "13" in the list, placing the prosecution against R. and others first; Held, that the prosecutor had the right of trying the indictments in the order entered by him.

IN this case a true bill against the defendant, Duffield and others, for conspiracy, had been found at the Spring Assizes, and at the same time a bill was found for the same offence against Rowland and others. Some of the defendants were the same in both cases.

The defendants traversed, and the two indictments were removed by *certiorari* into the court of Queen's Bench, and the defendants entered into recognizances to enter and try the indictments at the next assizes for Stafford. At the assizes both parties entered the cases. The prosecutor entered the indictments first, in the following order, being the second and third cases in the cause list.

"The Queen v. Duffield and others."

The same v. Rowland and others."

The attorney for Rowland entered the indictment against him, number "10" in the list; and the attorney for Duffield entered that indictment number "13."

Special juries had been struck to try both cases.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

On the court making arrangements and appointments for the trial of the special jury causes,

Whately, Q. C., and Keating, Q. C., on the part of some of the defendants, applied to his lordship to try the indictments in the order they were entered by the defendants. The defendants were under recognizances to appear at the assizes and enter the indictments. It was their duty to enter them. The prosecutors were not bound to enter them at all. This was not the mere case of a defendant entering a cause by proviso.

Allen, Serjt., resisted the application. It would be productive of great inconvenience in this instance, for the case of *The Queen v. Duffield and others* included many more defendants than that of *The Queen v. Rowlands*, and he might say that if the prosecution of Duffield's case failed, it was very improbable that the other indictment would be tried.

ERLE, J., said, he thought it was only the proper precaution on the part of the prosecutors to enter the cases. He remembered one instance where great inconvenience and interruption to the progress of justice had resulted, from the Crown not having taken the precaution to enter the cases, the traversers having given notice of trial, but neglected to try. When an indictment was removed by *certiorari*, and stood for trial on the civil side of the court, it had, with respect to the entering and order of trial, just the same incidents as any other cause. It followed, therefore, that the cases must be taken in the order in which they were first entered and stood in the cause list.

REG.
v.
DUFFIELD AND
OTHERS.
—
1851.
—
Practice—
Traverses.

Ireland.

DOWN SUMMER ASSIZES, 1851.

July 25.

(Before BALL, J.)

REG. v. HOY AND LARKIN. (a)

11 Vict. c. 2—Indictment—Evidence—Joint indictment—Practice.

A. B. and C. D. were indicted for having a pistol in their possession on a certain day within a proclaimed district.

Held, that evidence of the publication of the proclamation in "The Dublin Gazette" was sufficient under the statute 11 Vict. c. 2, sect. 9, without proving the posting of the proclamation within the district.

Held, also, that though the indictment charged the offence to be under the 11 Vict. c. 2, which was a temporary act, expiring in August, 1850, yet that the indictment concluding contra formam statutorum, and the statute 11 Vict. c. 2 having been continued till December, 1851, by the statute 13 & 14 Vict. c. 106, the indictment was well enough without specifically referring to the latter statute.

Held, also, that, though the prisoners were jointly indicted for having a pistol in their possession, yet the jury might, after the acquittal of one of them, find the other guilty.

LAURENCE HOY and Bernard Larkin were indicted under the statute 11 Vict. c. 2, sect. 9, for, on the 23rd June last, having in their possession a certain pistol within a proclaimed district; and in a second indictment, with appearing in arms by night to the terror of Her Majesty's subjects.

McMechan, for the prisoner Larkin, having objected that the prisoner could not be tried on both indictments at the same time,

Sir Thomas Staples, Q. C., for the Crown, elected to proceed on the first indictment, and called witnesses who proved the finding of a pistol upon the prisoner Hoy on the night mentioned in the indictment; but the evidence only went to show that the prisoner Larkin was present, and no arms were found upon him. The *Dublin Gazette*, containing a notice proclaiming the Barony of Upper Orion in which the offence was committed, was then read in evidence; and the counsel for the prosecution having closed their case,

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

McMechan contended that the evidence was incomplete, and that the Crown ought to have proved that the proclamation had been posted in the proclaimed districts.

Sir *Thomas Staples*, and *Crawford*, argued that such proof was not necessary, as the 9th section of the statute made the offence complete, from the day named in the proclamation, and not from the posting, and in support of this position cited *Reg. v. Otway*, 4 Cox's Crim. Cas. 73.

BALL, J., after consulting Perrin, J., said that he considered that the case of *Reg. v. Otway*, which had been decided by the Court of Criminal Appeal, was exactly in point, and that therefore he would follow it, and overrule the objection.

McMechan then submitted that, as the indictment charged the offence to be under the 11 Vict. c. 2, it could not be sustained, as the statute was a temporary one, and had expired in August, 1850.

Sir *Thomas Staples*, contra, referred to the 13 & 14 Vict. c. 106, by which the act of 11 Vict. c. 2, was continued until the 31st December, 1851.

McMechan urged that, even so, the latter act should have been referred to in the indictment; but

BALL, J., was of opinion that the allegation of the offence under the first act was sufficient, particularly as the indictment concluded "against the form of the statutes in that case made and provided;" but being of opinion that there was not any evidence against the prisoner Larkin, his lordship directed an acquittal as to him.

Larkin having been acquitted accordingly,

It was contended by *Moore*, that, as in the indictment the prisoners were charged with having had in *their* possession a pistol, when one had been acquitted, the indictment could not be sustained against the other, and *R. v. Messingham* (1 Moo. C. C. 257), was cited, but

BALL, J., overruled the objection, and the prisoner was found guilty.

McMechan for the prisoner Larkin.

Ross. S. Moore for the prisoner Hoy.

Sir *Thomas Staples*, Q. C., and *Crawford* for the Crown.

REG.
v.
HOY AND
LARKIN.

1851.

Indictment—
Evidence.

CENTRAL CRIMINAL COURT.

MAY SESSION, 1851.

May 16.

(Before ALDERSON, B., and TALFOURD, J.)

REG. v. WHYTE. (a)

*Forgery—Accepting bill of exchange in fictitious name.**Where prisoner had fraudulently used the name of another person for the purposes of his trade, and had afterwards accepted a bill in that name :**Held, that he could not be convicted of forgery, unless, when he first assumed the fictitious name, he contemplated the making of that specific bill.*

THE prisoner was indicted for forging and uttering an acceptance to a bill of exchange for 20*l.*, with intent to defraud one Samuel Morris. It appeared in evidence, that the prosecutor was a warehouseman, and, in October, 1850, the prisoner opened an account with him for lace goods. He represented that he was in partnership with Joseph Frederick Whiffen, who was his brother-in-law, and resided at Brentwood. The account was a monthly account, and the first and second were paid; but afterwards the prisoner got into arrear, and wanted the prosecutor to draw upon the firm, which at last he consented to do. The bill in question was drawn, and the prisoner accepted it, in the name of J. F. Whiffen & Co. Whiffen was called as a witness, and stated that he had never been in partnership with the prisoner, nor had the latter any authority to use his name in connexion with his business or otherwise.

Parry, for the prisoner, contended that, upon this evidence, the prisoner could not be convicted of forgery. To support the charge, it was necessary to show that the name had been assumed expressly for the purpose of the forgery in question; but here, long before the bill was accepted, the prisoner had traded under the name of Whiffen & Co. This was like the case of *R. v. Bontien*, (Russ. & Ry. 260.) There it was held not sufficient that the name should be proved to be a false name, but it must appear that it was assumed for the purposes of fraud in the particular transaction. In *R. v. Inhabitants of Burton-upon-Trent* (3 Mau. & S. 537), the

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

name by which a man was married was a false name, but he had assumed it some time before for purposes of concealment, he having deserted from the army; it was held that the marriage was valid, the name not having been taken for the purpose of fraud respecting the marriage itself.

Robinson, for the prosecution, submitted that if the prisoner assumed the name of Whiffen for the purposes of fraud, and he fraudulently accepted the bill in his brother-in-law's name, he would be guilty of forgery. It was immaterial that he had used that name before, if he had no authority to use it when he accepted the bill.

TALFOURD, J.—I think it will scarcely be sufficient to show that the name of Whiffen was assumed for the purposes of fraud generally, it must have been taken for the specific object of passing off this bill. The carrying on business in the false name might be for the purpose of creating a false impression, with a view to obtaining credit; that might support a charge of obtaining money or goods by false pretences, but not a charge of forgery.

ALDERSON, B., concurred.

Robinson contended that, at all events, it was a question for the jury whether, when the prisoner first assumed the name, it was not with the view, amongst other things, of drawing bills, and so supporting a false credit. In *Shepherd's case* (2 East P. C. 967), it was held that, although a man had been previously known by the fictitious name in which he had accepted a bill of exchange, it would not avail him in a defence to a charge of forgery.

TALFOURD, J.—I propose to leave the case to the jury in this way. First,—Whether, when the prisoner accepted this bill in his brother-in-law's name, he had reasonable grounds for believing he had authority to do so; and secondly,—whether he assumed the name of J. F. Whiffen & Co. with a view of defrauding the parties with whom he dealt, by issuing false bills of exchange, of which this was one. I do not think it would be sufficient that he assumed the name for the purposes of fraud generally. The jury must find that he contemplated issuing this particular bill, and, as far as my judgment goes, I do not see that there is sufficient evidence to warrant them in coming to such a conclusion.

Verdict, Not guilty.

Robinson, for the prosecution.

Parry, for the prisoner.

REG.
v.
WHYTE.
—
1851.
—

Forgery—
Evidence.

CENTRAL CRIMINAL COURT.

JUNE SESSION, 1851.

June 18.

(Before the RECORDER.)

REG. v. MEDLAND. (a)

Larceny—Pawning—Intent to redeem.

On a charge of larceny, it was proved that the prisoner had taken property from ready-furnished lodgings that were let to her, and had pawned it:

Held, that the fact that she had frequently pawned and afterwards redeemed portions of the same property, was no answer to the charge. There must not only be the intent, but also the ability to redeem, to render such defence available.

THE prisoner was indicted for larceny. It appeared that she had taken ready-furnished lodgings, and had pawned some of the property therein belonging to the landlord. It was proved that she had often pawned, and afterwards redeemed portions of the same property.

Robinson, for the prisoner, submitted that if the jury were satisfied that the prisoner took the property for the purpose of pawning, but with the intention of redeeming it, she would be entitled to an acquittal, because the intent would not be permanently to deprive the owner of it. *R. v. Phetheon* (9 C. & P. 552); and *R. v. Wright* (9 C. & P. 559), were referred to.

The RECORDER, after consulting the judges in the adjoining court:—I have taken the opinion of Mr. Justice Coleridge, and of Mr. Baron Platt upon this case, and they both think with me that there is nothing in the evidence that will justify the jury in acquitting the prisoner, on the ground that she took this property with the intention of redeeming it. It would be very dangerous to hold that the suggestion of such an intent would be sufficient to constitute a valid defence. A person may pawn property without the slightest prospect of ever being able to redeem it, and yet there may be some vague intention of doing so, if afterwards the opportunity should occur, however improbable it may be that it will do so. But it can never be said that there is an intention to redeem under circumstances that render it very improbable, or at least uncertain that such ability will ever exist. A man may take

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

my property, may exercise absolute dominion over it, may trade upon it and make a profit upon it for three months, and yet may say, when charged with stealing it, that he meant to return it to me at some time or another. I shall direct the jury, that for such a defence to be at all available there must be not only the intent to redeem, evidenced by similar previous conduct, but there must be proof also of the power to do so, of which the evidence here seems rather of a negative character.

REG.
v.
MEDLAND.
—
1851.
—
*Larceny—
Pawning—
Evidence.*

Verdict, Guilty.

Robinson, for the prisoner.

CENTRAL CRIMINAL COURT.

JULY SESSION, 1851.

(Before CRESSWELL, J.)

July 9.

REG. v. ROGERS. (a)

Larceny—Post-office—Post letter.

A. brought a letter, enclosing a 10l. note, to a district receiving-house, and desired that it might be registered. The postmistress took the money for the registration, and, being busy at the time, requested A. to call again. In the mean time she put the letter under a glass case, to which the prisoner had access. When the letter was taken up, for the purpose of being despatched, it was found that the note had been abstracted.

Held, that the letter was a post letter, within 1 Vict. c. 36, s. 47.

THE prisoner was indicted for stealing from a post letter a 10l. Bank of England note. It appeared in evidence, that a Mrs. Rice had taken a letter, which enclosed a 10l. note, to a district receiving-house, and had handed it to the postmistress, with a request that it might be registered. She paid the fee for registration; but the postmistress, being busy at the time, requested Mrs. Rice to call again, when she would give her a receipt. In the mean time she put the letter under a glass case in the shop, to which the prisoner had access. A short time afterwards Mrs.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG.
v.
ROGERS.

1851.

*Larceny—
Post letter.*

Rice called again: the letter was taken from the case and stamped, but it was subsequently discovered that the 10*l*. note had been abstracted.

O'Brien, for the prisoner, contended that, under the circumstances, the letter could not be taken to be a post letter. It was delivered to the postmistress, not for the purpose of being sent through the post-office, but until something else was done with it, namely, until it was duly stamped. While that remained undone it could not be considered effectually posted. *R. v. Harley* (1 C. & K. 89) was a case very similar in its circumstances. There the post-office was at an inn, and a person was sent to put a letter, containing a promissory note, into the post. He took it to the inn, with money to prepay the postage. He did not put it into the letter-box, but laid the letter, with the money upon it, upon a table in the passage of the inn, and he pointed out the letter to the prisoner, who was a female servant at the inn. The prisoner stole the letter and its contents, and it was held that she could not be convicted, for the letter had not become a post letter when it was stolen.

Bodkin (with whom was *Clarkson*, for the prosecution) relied upon the words of the statute. The 47th section of 1 Vict. c. 36, enacted that "the term 'post letter' should mean any letter or packet transmitted by the post under the authority of the Postmaster-General;" "and a letter should be deemed a post letter from the time of its being delivered to the post-office to the time of its being delivered to the person to whom it was addressed;" "and the delivery to a letter carrier, or other person authorized to receive letters for the post, should be a delivery to the post-office." In this case the letter was actually delivered to the postmistress, and therefore became a post letter from that time. She had authority to receive it, which was not the case in *R. v. Harley*.

CRESSWELL, J.—I think the case of *R. v. Harley*, does not apply here. There, there was no delivery to any person authorized to receive the letter. Here it was delivered into the hands of the postmistress herself. I think this is a post letter, within the statute.

Verdict, Guilty.

Clarkson and *Bodkin*, for the prosecution.

O'Brien, for the prisoner.

CENTRAL CRIMINAL COURT.

JULY SESSION, 1851.

July 9.

(Before the RECORDER.)

REG. v. SAWARD. (a)

Larceny—Bailment.

The prisoner was employed by the prosecutor to make up canvass bags, at his (the prisoner's) own house. The canvass was cut out at the shop of the prosecutor and taken away by the prisoner. A portion of it was duly worked up and returned, the remainder was converted by him to his own use.

Held, that he could not be convicted of larceny.

THE prisoner was indicted for larceny.

It appeared that he was employed by the prosecutor, who was a tarpauling manufacturer, to make up for him canvass bags. The canvass was cut out by the prisoner, at the prosecutor's shop, and taken away by him; and it was his duty to make it up at his own house, and bring back the bags complete. A portion of a large quantity of material received by him was worked up and brought back to the prosecutor; the remainder he pawned, and appropriated the money to his use.

The RECORDER (after consulting Mr. Justice Cresswell).—An extremely nice point of law arises in this case. If, under ordinary circumstances, a servant has possession of his master's goods, the possession of the servant is the possession of the master, and if he makes away with the property, he is guilty of larceny. But a very refined distinction has been taken between the case of a servant having goods of his master's upon his master's premises, and having them to work up upon his own. He is, in the latter case, considered not in the light of a servant, but in that of a bailee. If he then makes away with the property, he is guilty of a fraud, but not of a larceny. If, on the other hand, a servant so entrusted were to separate a portion of the goods, and dispose of them to his own use, then the very act of separating them would determine the bailment. He would no longer be in lawful possession of those he had so separated with a fraudulent intent, and would therefore be guilty of larceny in converting them. Here it appears the prisoner

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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v.
SAWARD.
—
1851.
—
Larceny—
Bailment.

had separated and made up a portion of the materials, which would be a lawful act; his pawning the rest, therefore, would not render him guilty of larceny. I have consulted Mr. Justice Cresswell on the subject, who, after some hesitation, thinks that the jury should be directed to acquit the prisoner.

Verdict, Not guilty.

CENTRAL CRIMINAL COURT.

AUGUST SESSION, 1851.

August 20.

(Before Mr. JUSTICE ERLE.)

REG. v. YOUNG AND MUEZZELL. (a)

Evidence—Husband and wife—Voir dire.

One of two prisoners had married his deceased wife's sister :

Held, that she was a competent witness against him upon his trial.

A witness for the prosecution was examined on the part of the prisoners on the voir dire, and deposed that she was married to one of them :

Held, that she might be further examined on the voir dire, on the part of the prosecution, to prove that the same prisoner had been previously married to her sister.

The witness stated, on such further examination, that she and her sister, who was seven years older than herself, had always lived together with their parents, and that she always believed her to be her sister :

Held, sufficient proof of the relationship.

THESE prisoners were indicted for stealing, whilst in the service of the post-office, a letter containing bank notes. A witness was put into the witness-box, who stated, on being examined on the *voir dire*, that she was married to the prisoner Muezzell in August, 1849.

Clarkson (with whom was Bodkin, for the prosecution) was about to ask her further questions on the *voir dire*:

Parry (for the prisoner Muezzell) objected to his doing so. As the evidence at present stood, the witness was proved to be

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

the prisoner's wife, and if it was sought to show that she was not so, by reason of the marriage being invalid, it ought to be done by independent testimony, and not by any further examination of the witness. If she was the prisoner's wife, no evidence could be elicited from her. If she was not, that fact must be proved before she could be examined.

ERLE, J.—I am of opinion that any witness examined to a particular fact may be questioned as to her knowledge of circumstances connected with it. In bigamy, the second wife may prove the first marriage, if she was present at it, and that, notwithstanding she had previously stated she was married to the person charged. It must not be taken at present that the witness is the prisoner's wife; that is the precise question we are inquiring into.

The witness was then further examined, and stated that she had had a sister, who was seven years older than herself, and who was married to the prisoner Muezzell in 1846, and died in 1848. The witness was present at the marriage. She and her sister had been brought up together with their parents: she always believed that they were sisters.

Clarkson now required that the witness should be sworn.

Parry and Ballantine (for the prisoners respectively), objected. If it was clearly established that the witness was the sister of the prisoner's first wife, it certainly could not be contended, after the case of *R. v. Chadwick* (11 Q. B. 173), that she was incompetent, but it was necessary that that should be shown more clearly than had been done at present. Her mere statement, that she believed the first wife to be her sister, was not sufficient. Reputation of relationship would not do in a criminal case, where other facts, the effect of which it was sought to obviate, had been specifically proved. In *Campbell v. Twemlow* (1 Price, 83), a case is referred to by Richards, B., in which Lord Kenyon refused to allow a woman, who had been living with a prisoner, and who had been mentioned by him in the course of the trial as his wife, to be called into the witness-box, although she was prepared to prove that they were never married. Here the first wife was seven years older than the witness, and, therefore, it was impossible that the latter could know whether she was her sister or not. The evidence of some person present at the birth was essential in such a case as this.

ERLE, J.—I am of opinion that the evidence of this witness is admissible. It is quite clear, that if a person is questioned on the *voir dire*, with the view to raise an objection to her competency, she may also be examined to remove that *prima facie* ground of objection. If she says that she was married to the prisoner, she may go on to show that the marriage was void, and did not create between them the relation of husband and wife. If her evidence, then, as to the first wife being her sister, is admissible, I think it is sufficient, and that although seven years younger, she may still

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Evidence.

prove the relationship. There is no rule of law requiring that such a fact should be established by that which would amount to demonstration, namely, by the evidence of some person who was present at the birth.

Evidence admitted.

Clarkson and Bodkin, for the prosecution.
Ballantine and Parry, for the prisoners.

CENTRAL CRIMINAL COURT.

AUGUST SESSION, 1851.

August 24.

(Before WIGHTMAN, J.)

REG. v. UPTON AND GUTTERIDGE. (a)

14 & 15 Vict. c. 19, s. 6—*Railway—Malicious obstruction.*

The prisoners placed a stone upon a line of railway, so as to cause an obstruction to any carriages that might be travelling thereon:

Held, that if this was done mischievously, and with an intention to obstruct the carriages of the company, the jury would be justified in finding that it was done "maliciously."

THE prisoners were indicted under the 14 & 15 Vict. c. 19, for unlawfully and maliciously placing a stone upon the North Woolwich Railway, with intent to damage, injure, and obstruct the carriages travelling thereon. It appeared that the prisoners, who were respectively of the ages of eleven and thirteen, were seen to go upon the railway, and whilst one held the lever by which the points are turned, so as to separate two portions of the rail, the other dropped a stone between them, so as to keep them separated. The result would have been, had the act not been detected, that carriages passing over that portion of the line would have been thrown off the rail. There was no other motive suggested on the part of the prosecution for the act except that of wanton mischief.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

WIGHTMAN, J., to the jury.—In order to convict the prisoners, you must be satisfied, in the first place, that they wilfully placed the stone in the position deposed to by the witnesses. Secondly, that it was done maliciously, and with intent to damage and obstruct the carriages travelling upon the line. It has not been specifically proved here that there was on the part of the prisoners any malice or ill will against the railway company, or against any of the passengers travelling upon the line, but I am of opinion that it is not necessary that malice, in the ordinary sense of that word, should be distinctly proved. If this was done mischievously, and with a view to damage and cause obstruction, I think you will be justified in point of law in finding that it was done maliciously.

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Railway—
Obstruction of
—14 & 15 Vict.
c. 19, s. 6.

Verdict, Guilty.

Ballantine, for the prosecution.

Spicer, for the prisoners.

Ireland.

DUBLIN QUARTER SESSIONS.

1851.

(Before the RIGHT HON. FREDERICK SHAW, Recorder.)

REG. v. COPELAND. (a)

Larceny—Evidence—Fraud—Duty of grand jury.

Evidence that prisoner took away guns under pretence of bringing them to his employer, a country gentleman, to approve of, and absconded, after pawning them, not sufficient to constitute larceny, inasmuch as the gunmaker placed a certain confidence in the prisoner, by giving him the guns on his own statement.

It is the duty of a grand jury, when in doubt as to whether the traverser is legally guilty, or can be convicted for the crime for which bills are sent up to them, if they believe him morally guilty, to find the bills, and give the court an opportunity of deciding the point.

THIS was an indictment for stealing two gowns, value 2*l.*, the property of one John Walsh. It appeared from the evidence of the prosecutor Walsh, that the prisoner Copeland came on horseback to the door of his shop, and having asked to see some

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

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guns, was shown several fowling-pieces. He selected two; and having been informed of the price, said he wanted them for his master, a country gentleman of the name of Nolan, and that he would take them to the hotel to him, when, if they were approved of, he would return and pay for them, or if not, bring them back. At the same time he asked Walsh, could he give him any place to put up his horse for an hour or two. Walsh, never suspecting any harm, allowed him to take away the guns, after having had the horse put up at a friend's stable. The prisoner then went away, and he never saw him again until after he was arrested; he confessed that the story about Nolan was a fabrication, and that the horse was not his own, but that he had hired him. A bill had been sent up to the grand jury against the same prisoner for stealing the horse, which they ignored.

The RECORDER expressed his opinion that, on the evidence as it stood, the prisoner could not be convicted of the larceny. The prosecutor, John Walsh, according to his own statement, had trusted the prisoner with the guns on the credit of his story, and freely allowed him to take them away. The case before them approached very near the line between fraud and larceny; but, considering all the facts of the case, and the authorities on the subject, he could not consider it a case of larceny; and as that was the only question for the jury to decide, he felt bound to direct them to acquit the prisoner.

Not guilty.

On the next occasion of the grand jury bringing down bills into court, the Learned Judge adverted to the fact, that they had ignored the bill against Copeland for horse stealing, and at the same time that he did not object to any of their findings, or mean to say that they had improperly ignored that bill, he felt it to be proper, from what he saw of that case, to point out to them more particularly their duty. Where a grand jury think that a traverser is *morally* guilty, the better plan for them is to find the bill, and let the court below pronounce of what (if any) offence the traverser can be legally convicted. In this case, if they thought that the traverser had been morally guilty of either fraud or larceny, and were in doubt whether he could be convicted on the indictment, the better plan was to find a true bill. These remarks were merely intended for their future guidance, and had no reference to what had been done.

Ireland.

DUBLIN QUARTER SESSIONS.

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(Before the RIGHT HON. FREDERICK SHAW, Recorder.)

REG. v. CUNNINGHAM. (a)

Assault and battery—Practice—Calling witnesses for prosecution after they close.

Where the case for the prosecution has been rested on the evidence of a single witness, who proves the entire charge, but whose evidence is unexpectedly sought to be discredited by the witnesses for the defence, the court may allow witnesses to be called by the prosecution, after the defence is closed, to corroborate the evidence of the single witness examined for the prosecution.

THIS was an indictment for an assault and battery. One witness (Hetherington) only was called to prove the assault, and the entire case for the prosecution, which he did clearly and satisfactorily. Several other witnesses for the prosecution were ready in court, but it was not thought necessary to examine them. The testimony of the first witness called for the defence was calculated to discredit Hetherington's testimony. Under these circumstances, on the application of the prosecutor, the Recorder allowed him to call and examine some of the witnesses whom he had in attendance, in order to corroborate Hetherington's testimony.

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

OXFORD CIRCUIT.

SHREWSBURY SPRING ASSIZES, 1851.

March 22.

(Before Mr. JUSTICE PATTESON.)

REG. v. BAXTER. (a)

Embezzlement by police officer—Statutes 2 & 3 Vict. c. 93 ; 3 & 4 Vict. c. 88—Relation of master and servant—Receipt of money to master's use.

By stat. 2 & 3 Vict. c. 93, for the establishment of police constables, power is given to the justices of a county or division to appoint a chief constable, who, subject to the approval of two justices, has the power to appoint constables and superintendent constables. It was the duty of the constables of the county of S., so appointed, to account for and pay weekly to the superintendent of their division all moneys received by them, and it was the duty of the superintendent to return weekly to the chief constable a statement of such moneys. It was also the duty of the superintendent to pay the constables their wages weekly. In practice, however, it was the custom of the superintendent, in balancing the accounts with his men, to set off the sums received by them in the course of their duty against their wages, the balance struck going over to the next account, and so on from week to week without any money actually passing from one to the other. A constable having in this way accounted to the superintendent for the sum of 2l. 3s. 6d. received by the former, the latter fraudulently omitted that sum in his account with the chief constable, and subsequently denied its receipt.

Held, per Patteson, J., that there was a constructive receipt of that sum by the superintendent from the constable, so as to support the allegation of the receipt of the money in an indictment against the superintendent for embezzlement.

Held, also, that the superintendent was the clerk and servant of the chief constable, and that the money might be alleged to have been received for and on his account.

Held, that the superintendent could not be described as the clerk or servant of the treasurer of the county, to whom the chief constable transmitted all sums received by him from the superintendent.

The 3 & 4 Vict. c. 88, directs that the moiety of fines imposed by the justices, on informations laid by the police constables, should be invested in such manner as the justices should direct, so as to form a superannuation fund for the constables. A superintendent of police,

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

having received a sum of money from the clerks of justices, the amount of penalties imposed by them on the information of such superintendent, and the latter having fraudulently omitted to account for such sum to the chief constable,

Query, whether an indictment for embezzling such sum could be supported under these circumstances; and

Query also, whether, if it could, the superintendent should be described as the servant of the chief constable, or of the trustees of the superannuation fund.

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THE prisoner, William Baxter, was indicted for embezzlement. The indictment contained five counts. The 1st count alleged that the prisoner, on the 13th of March, 1849, at the parish of Wellington, being then and there employed in the capacity of a clerk to Dawson Mayne, did, by virtue of his said employment then and there, and whilst he was so employed as aforesaid, receive and take into his possession certain money to the amount of 12*l.* and 4*s.* for and in the name and on the account of the said Dawson Mayne, his master, and the said money then and there fraudulently and feloniously did embezzle, &c.

The 2nd count charged an embezzlement within six months of the first, viz., on the 12th of July, 1849, of the sum of 2*l.* 3*s.* 6*d.*

The 3rd count, in like manner, charged an embezzlement on the 26th of July, of 2*l.* 3*s.* 6*d.*

The 4th count was for the embezzlement of the same moneys mentioned in the 3rd count, but alleged that the prisoner was employed in the capacity of a clerk to Joshua John Peele, as treasurer of the county of Salop, and that the money was received by the prisoner on his account.

The 5th count charged the embezzlement of the same sum mentioned in the 1st count, alleging that the prisoner was employed in the capacity of a clerk to the Hon. Thomas Kenyon, Dawson Mayne, John Loxdale, and Joshua John Peel, as trustees of the Shropshire Constabulary Superannuation Stock or Fund, and that the money was received by the prisoner for and on account of the said trustees.

Greaves, Q. C., and Scotland for the prosecution.

Phillimore for the prisoner.

Greaves stated that this prosecution had been instituted on behalf of the magistrates against the prisoner, who had been superintendent in the C division of the police force since the year 1840; and the charge against him was, that he received certain moneys, in his character as a superintendent of police, which he was bound to account for, and pay over to the chief constable, but which he had embezzled. By the 2 & 3 Vict. c. 93, which was intitled *An Act for the Establishment of District and County Constables by the authority of Justices of the Peace*, provision was made by the first section for the way in which the constables might be appointed; and then, on their being appointed, sect. 4 enacted that the justices might appoint a person to be chief constable; and by sect. 6 it was enacted that, subject to the approval

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of two or more justices in petty sessions assembled, the chief constable might appoint the other constables and superintendents in each division, and at his pleasure dismiss all or any of them. A police force had for some years been established in Shropshire, and a chief constable of the name of Mayne had been appointed. The chief constable had afterwards appointed the prisoner a superintendent of the C division, and his duty was to superintend the other constables in that division, to take an account weekly of the moneys received by them in the course of their duty, and which were entered in their books, and weekly return to the chief constable a statement of those moneys so accounted for by the constables. By the 3 & 4 Vict. c. 88, s. 10, provision was made for a superintendent fund. It being extremely desirable that, when constables became incapable, by age or infirmity, from discharging their duties, some provision should be made for them, that section enacted that there should be deducted from the pay and salaries of the constables a sum according to such yearly rate as the justices of the county should direct, not being a greater sum than 2*l.* 10*s.* in 100*l.*; and it also directed that the moiety of fines imposed by the justices, on informations laid by the constables, and all the moneys accruing from stoppages of pay during the sickness of any of the constables, should from time to time be invested in such manner as the justices should direct, so as to form a Superannuation Fund. Now one portion of the indictment against the prisoner alleged, that he embezzled the moiety of certain fines imposed by justices of the peace, on information laid by police constables. Those moiety of fines were entered by the constables in books, some of which would be put in evidence; and one of the charges against the prisoner was, that he did receive such moiety of fines from the other constables, that he did not account to the chief constable, but that, in fact, he embezzled them. By sect. 17 of the same act it was also provided, that when one of these police constables did any duty which might have been done by a local constable, the police constable was to receive the fee, but was not to put it into his pocket; he was to account for it weekly to the superintendent of the division, who was further to account to the chief constable, and then the chief constable was to make a return to the treasurer of the probable sum which would be required for the ensuing week to meet the expenses of the force, and he received from the treasurer a cheque for each superintendent to whom it was given, and he paid his men accordingly. Another charge made against the prisoner was, that he had not accounted for these sums which he had so received. The superintendents were also entitled to receive moiety of certain fines, and if they did so, were bound to account for them to the chief constable. Now on the 13th of March, in the last year, the prisoner was at Newport, and received 12*l.* 4*s.* as moiety of fines in cases in which he had himself been informer, and of which he had never given any account whatever. The learned counsel proceeded to state the nature of the evidence which he was about

to adduce, and briefly referred to a point of law which would probably be raised on behalf of the prisoner, as to whether he was the servant of Captain Mayne. He submitted, that as the prisoner was appointed by Captain Mayne, who had also the power of dismissal, Captain Mayne was, to all intents and purposes, his master; but, to avoid any doubt, it was alleged in one of the counts that he was the servant of Mr. Peele, the treasurer of the county, and in another he was charged with embezzling money, the property of the trustees of the Superannuation Fund.

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Captain Mayne, chief constable of Shropshire, produced the appointment of the prisoner as a superintendent of the police force, and stated that it was signed by the witness. The prisoner was not discharged from the force; he left it on the 19th of January last, he believed. He (the chief constable) had framed rules and regulations for the government of the police force, in accordance with the act of Parliament. The copy of those rules and regulations, now produced, he had delivered to the prisoner. In accordance with one of these rules the constables kept a book, in which they entered all sums received by them for duties performed. The book produced was in the handwriting of policeman James, with the exception of the signature of the prisoner Baxter, and the magistrate's signature. It was the duty of the superintendent to go round his division as often as possible, examine the books of the constables, and receive what fines had been paid to them. It was also his duty to copy into a book which was supplied to him the entries in the constables' books, the amount of money received, the date when he received it, and to account to him (witness) weekly. The book produced was the prisoner's book, which he kept whilst superintendent. The return or "pay list" made to the witness weekly, ought to be an exact copy of the superintendent's book, as far as the names and money were concerned. From that pay list he (witness) made out a return which he called an estimate, showing what sum would be required from the treasurer during the ensuing week. The superintendents were themselves sometimes informers, and it was their duty to make a return of sums received by them as such informers.

Phillimore here said, he thought he might as well, to save time, now raise an objection which it would be his duty to make. He contended, that whatever rules and regulations might be made by the chief constable, they could have no force or effect in reference to what constituted the crime of embezzlement. If Baxter had received money as an informer, he never could be said to have received it by virtue of his having been the clerk or servant of Captain Mayne. He might have been guilty of a breach of trust, but the evidence now proposed to be given was clearly not relevant to a charge of embezzlement.

Greaves submitted, that by virtue of the 10th section of the Constabulary Act, if the informer was a police constable he was not entitled to the penalty, but it became payable to the Superannuation Fund. The police constable was only the conduit pipe

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for conveying that money to the fund. He submitted, that the practice which had universally prevailed in that county was the correct one, and that the police constable did not receive the fine *qua* informer—in his own right, but that the act converted the money into use, and that it never was money had and received by the informer to his own use. He submitted, that the superintendent received the money as the servant of Captain Mayne, and that he was bound to account for it.

PATTESON, J.—After looking at the section of the act, observed, that it was not very intelligible.

Greaves.—No, my lord. I admit the section is very badly framed, as most modern acts of Parliament generally are. Your Lordship will observe that the point raised is one of considerable importance.

Scotland remarked, that the objection taken did not apply to all the counts of the indictment; it only applied to the first and last, and the case might, therefore, go on, and, if necessary, the point be reserved.

Greaves.—The question is so important, that I should with very great respect, request your lordship to let the case proceed, and reserve the point.

PATTESON, J. decided that the evidence should be received, and the point be reserved for the opinion of the judges.

Captain Mayne's examination resumed.—On the 21st of January last, the prisoner attended by his direction at the county treasurer's office. To the best of his recollection, he told him there were sums of money that were not accounted for which had been received by him as informer, in cases of illegal weights and measures. The prisoner said he was not aware that it was part of police duty. He (witness) told him that he must be quite aware that anything he was ordered to do was police duty, and the simple question was, "had he received the money, or had he not?" The prisoner replied, "just so. I have not got the money;" or "I have not received it." Mr. Peele, the county treasurer, said to the prisoner, "there are several sums of money that are not accounted for in cases where you are the informer, and have you received these sums or not?" He still denied having received them. He (witness) then told him that he must leave his books, and the constable's money books, at the treasurer's office; that they must, of course, all be compared and examined strictly. Mr. Peele then said to Baxter, "are you sure that we shall find no other sums of money that are not accounted for in your books?" He believed the prisoner then said, "not that I am aware of." According to police constable James's book, there were several sums received on the 12th of July by Baxter, and the sums were receipted in the book by the prisoner. The entries in the prisoner's book on the 3rd of July appeared to correspond with those in the constable's book on the 12th of July. The sums in James's book amounted to 3*l.* 2*s.* 2*d.*, and those in the prisoner's book to 18*s.* 8*d.*, which, deducted from 3*l.* 2*s.* 2*d.*, left 2*l.* 3*s.* 6*d.* as

a balance unaccounted for by the prisoner. There was another return made by the prisoner from the 8th to the 13th of July, of all sums of money received by the constables within his division during that period. According to police constable Pugh's book, there were sums received by the prisoner on the 26th of July. He found five of these items entered in the prisoner's book, amounting altogether to 1*l.* 1*s.* 8*d.*, and leaving another balance unaccounted for of 2*l.* 3*s.* 6*d.* He held in his hand the pay list from the 22nd to the 28th of July. There was no entry, either in that or any other pay list returned to him by the prisoner, of any sum received from Mr. Liddell on the 13th of March. Mr. Liddell was the magistrate's clerk at Newport.

Cross-examined.—He should have considered it a breach of the police rules if Baxter had said to him and Mr. Peele, "Here is the money; I received it last September." It would have depended on circumstances whether he would have dismissed him. The prisoner said at once, in answer to his question, that he was not aware it was any part of police duty to give an account of money which he had received as informer. On looking over the account he did not see that Baxter had ever paid any sums received by him as informer. Baxter had been in the force ten years, but the police had not been acting as informers during all that time: he believed they commenced so to act in 1844. This was the first time he had called him to account for moneys received as an informer. He should not call a superintendent, a "clerk" to him (Captain Mayne), but he did not know what he might be considered legally. He never considered him his servant. He examined the superintendent's books once every quarter.

Re-examined.—The police had no authority, without his approbation, to lay informations. Directions were given to the superintendents to account for the fines in the cases of illegal weights and measures. He felt satisfied that Baxter knew this, though it was not in the printed regulations.

Joseph John Peele, treasurer of the county of Salop, and of the Police Superannuation Fund in that county, explained the course adopted with reference to the Superannuation Fund, and stated the conversation with the prisoner on the 21st of January, deposed to by Captain Mayne. He asked Baxter whether he had received some moieties of penalties for using illegal weights and measures. The prisoner hesitated for a short time, and then said, "I did not know that it was police duty." On which Captain Mayne said, "nonsense;" it does not matter whether it is police duty or not; the question is, have you received the money?" The answer then was "I have not." Upon which witness said, "there are some deficient in three places in your division, and as you are the informer, the inference is that you have received them. I want to know whether you have or not?" "I have not," was the answer. Witness then said, "Do not answer in haste, now; consider. If you have received them, tell us so." Baxter said, "he had not; perhaps the justice's clerk had." After the prisoner had

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denied a second time having received the money, he (Mr. Peele) said, "I understand, Baxter, from the chief constable that he has not compared your book with the constable's book. This will, therefore, be done strictly, and I now ask you, "are there any other sums of any sort or kind that you have received, and not accounted for?" The answer was, "not that I know of." He then told him that on his return home he had better examine his papers, and if he found that he had made a mistake, he had better send up an account in writing. He (Mr. Peele) mentioned particularly to the prisoner the sums which he had received at Newport, Wellington, and Shiffnall, and had not been accounted for. He mentioned three sums—one in the indictment, and two others. Witness had the means of discovering any omissions in the pay-lists. For instance, if there were certain items omitted which a superintendent had received from a constable, he could detect them, because, immediately after the sessions or assizes, he or his clerks compared the pay-lists with the allowances or prosecutions and the magistrate's certificates, and, therefore, if a constable had received money for attending as a witness, or in any other way, he could see whether the pay-lists corresponded with those allowances and certificates.

Cross-examined.—Captain Mayne had no control over Baxter's salary as a superintendent of police.

Joseph James, police constable, stationed at Dawley, identified his book, containing the sums alleged to have been received from him by the prisoner. He stated that he believed he did not pay over those sums to Baxter, but that they were taken into consideration when he settled with the prisoner for his pay. He believed that when he settled with Baxter on the 12th of July, there were three weeks' pay due to him. His pay was 17s. 7d. a week, after deducting the allowance to the Superannuation Fund.

Cross-examined.—He did not recollect ever having paid any money to Baxter.

John Pugh stated that he was a police officer in July last. He did not remember paying any money to Baxter on any occasion. Sometimes he had received more money than was coming to him for his week's wages; he entered it in his book, and signed the pay-list, and the balance stood over for another week, and formed part of his next week's wages. If, however, he happened only to have received fees amounting to 4s. in one week, the prisoner would pay him 13s. 7d., to make up the 17s. 7d. as his week's wages.

Mr. W. Liddell, magistrates' clerk, at Newport, proved that on the 13th of March, 1849, he paid over to the prisoner 12l. 4s., a moiety of the penalties inflicted on persons for using illegal weights and measures. These were cases in which Baxter was the informer.

Cross-examined.—I paid the amount to Baxter by direction of the magistrates.

Robert Fiddler, sub-inspector of police stationed at Stafford,

stated that he apprehended Baxter in Liverpool on the 17th of February last. He told him the charge against him, and he replied, "that is all right; I will go along with you quietly." He afterwards said it was only 39*l.*, and he could make that all right.

This being the case for the prosecution,

Phillimore submitted that his learned friends had failed to support the indictment by legal evidence. With regard to the sum which Baxter received as informer, the subject of the 1st and the 5th counts, under no pretence could it be said that he received it as clerk or servant. He received the money as informer, under the 5 & 6 Will. 4, c. 63, s. 32, and the question was not what was to be done with the money, but how did it reach his possession? By virtue of what? A stranger, not trusted, could not embezzle money. He could steal it, but could not embezzle it. But the second objection was that the prosecution had completely failed in making out that Baxter was the clerk or servant to any of the parties laid in the indictment; and, moreover, it was quite clear, that with regard to the two other cases, the subject of the 2nd and two subsequent counts, he never received from the police constables the money which he was charged with embezzling.

PATTESON, J.—He signed a receipt for it, and it was quite clear that if the precise sum due for wages had been the precise sum payable by the constable for fines received; if, instead of paying over the 17*s.* 7*d.* to the prisoner, and receiving back the same 17*s.* 7*d.* as his wages, they had balanced the account, that would have been 17*s.* 7*d.* received by the prisoner.

Phillimore—The old act of Parliament required the exact coin to have been paid which was embezzled, but surely it could not be contemplated by the present statute 7 & 8 Geo. 4, c. 29 (*b*) which

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(*b*) The statute 14 & 15 Vict. c. 100, had not passed at this time. It does not appear, however, to affect the points raised in this case. Sect. 13 enacts, that if, upon the trial of any person indicted for embezzlement as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose, or in the capacity of a clerk or servant, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if, upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement; and no person so tried for embezzlement or larceny as aforesaid shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts."

Section 18 further enacts, that "in every indictment in which it shall be necessary to make any averment as to any money, or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved, and, in cases of embezzlement and obtaining money or bank notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or

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enlarged the powers of the old one in order to get rid of the difficulty of tracing the exact coin, that no money whatever should be paid; there must surely be some coin received to constitute the crime of embezzlement. In a case where it appeared by the books of a clerk charged with embezzlement that he had received much more than he had paid away, and from this the prosecutors wished it to be inferred, that he must have embezzled some particular note or piece of money; it was held that this was not enough, and that it was necessary to prove that some distinct act of embezzlement had been committed: (*Hebb's case*, 2 Russell on Crimes, 1242, 1st edition.)

Greaves, contra, submitted that the prisoner was, within the words of the act, a clerk or servant to Captain Mayne, the chief constable. The chief constable had the power to appoint, subject to the approval of two or more justices; he had the power to dismiss at his own option, at any moment; he had the power to make whatever rules and regulations he thought fit, subject only to the control of the justices in Quarter Sessions. He, therefore, apprehended that that was quite sufficient to constitute the chief constable master under the statute relating to embezzlement. For instance, in the case of trustees, numerous indictments had been sustained against prisoners for embezzling money belonging to trustees, and there could be no doubt that in such a case the trustees were to all intents and purposes the master of the party who embezzled. If the argument of his learned friend were good, no guardian or overseer could in any instance be a master. The real question was, "Aye or no, was this person liable to be indicted for embezzling a moiety of penalties he received, he himself being the informer?" Now his construction of the act was this—By the 10th section the receipt by the prisoner was made a receipt for the Superannuation Fund; he was *qua* police constable, an informer in right of the Superannuation Fund. This was a very important question and was deserving of consideration. The next question was, whether an accounting, in the way which had been stated by the police constables, came within the statute. He was not aware of any difficulty to prevent its being so, but, on the other hand, the difficulty would be very great to hold that it did not come within the act, because a man would then only have to account with a person and escape altogether from the penalties of this act of Parliament. Did it lie in the mouth of the prisoner to set up as a defence, "I did not receive these sums, but they only passed as credit in an account."

Scotland followed on the same side.—As to the sums received as informer, if the prisoner took the money in his capacity as servant and in the course of his duty, and did not account for it, he must be guilty of embezzlement. A servant appointed for one purpose

any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly."—[J. E. D.]

might be employed for another purpose, and if he took money in that other capacity he might be guilty of embezzlement. That the prisoner had received these moneys in pursuance of duties arising out of the relation of master and servant had been sufficiently established. It had been distinctly proved that it was part of the duty of the prisoner to account for these sums to Captain Mayne.

PATTESON, J.—But then you see he must have received them in respect of his employment as clerk or servant. Mr. Phillimore's objection is, that he received them in his capacity as informer.

Scotland.—Under the rules and regulations the prisoner knew that he received them as a police officer on account of his employer, Captain Mayne. Then, with respect to the way in which the money was paid over. It was not necessary that the actual specie should be handed to the superintendent; it was sufficient if that took place which amounted to a constructive receipt of the money.

Phillimore referred to the case of *The Queen v. Lloyd Jones* (8 C. & P. 288), in which it had been held by Baron Alderson that some specific sums must be proved to have been embezzled. In that case it was opened that the prisoner had been shopman to the prosecutrix, and that it would be proved that there was a deficiency in the prisoner's accounts, but that there was no proof of the embezzlement of any particular sum. Mr. Baron Alderson said, "It is not sufficient to prove at the trial a general deficiency in account, some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen."

Scotland observed that, in the case cited, there had only been a general accounting; but in this case it was clearly proved that the specific sums had been received by the constables, entered in their books, and in the last column of each page there was a receipt in the handwriting of the prisoner.

Phillimore replied.—He submitted to his lordship, most confidently, that embezzlement could not be committed unless a specific sum had been handled, and unless that specific sum had been embezzled. It was not a question as to the moral guilt of Mr. Baxter: the question was, whether he had been legally guilty of embezzlement. He submitted that he had not; first, because he was not the clerk or servant of any of the parties mentioned in the indictment; and next, because he had never received the money at all.

PATTESON, J.—This is a case of considerable difficulty in any view. With respect to those instances in which the money had been received by the constables, and ought to have been paid over to the superintendent, there seems to have been great irregularity, because there ought not to have been any such account running between them; but the constables ought to have received their wages weekly, and ought to have paid all the sums they had received to the superintendent when he came round to prepare his account: but I rather think it is a constructive receipt of the

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money by the superintendent. Still I would give the prisoner the benefit of reserving that point if it should become necessary. And now, with regard to his being a clerk or servant to Captain Mayne. Captain Mayne says, "He is no servant of mine; I never considered him so. But the question is, whether he was in point of law his servant. Now he is appointed by Captain Mayne, and is removable by him at pleasure; and the prisoner's duty was to receive the moneys from the constables and pay them over to Captain Mayne, not to the treasurer. I think there is no ground for saying that he was the clerk or servant of Mr. Peele; but as to Captain Mayne I am inclined to think he is, and that the receipt of the money is sufficiently established as regards the 2nd and 3rd counts, and therefore that those two counts have been proved, if the jury believe the evidence. I have much greater difficulty with respect to the others; but with regard to the moiety of the fines the prisoner is alleged to have received in his capacity of informer, I do not think the circumstance of his being a police officer necessarily qualifies him to be an informer—on the contrary, it rather disqualifies him. It is not in the printed regulations, but it is said to have been ordered afterwards, and Captain Mayne says he has no doubt that the prisoner knew it. If, therefore, there had been no other counts in the indictment, I should have been disposed to have said that it would not do; but as there are other counts on which I must of necessity reserve a point for the opinion of the judges, I think it would be very desirable to take their opinion on this point also, and it will, perhaps, settle a question which is very important.

Phillimore then addressed the jury.

The learned judge having summed up the evidence, the jury, after a short deliberation, returned a verdict of guilty on the 2nd and 3rd counts, those relating to the sums received on account from the constables.

After a consultation between the counsel for the prosecution and the prisoner, Baxter was again arraigned on an indictment charging him with a misdemeanor at common law; namely, with having rendered a false and fraudulent account of moneys received by him as a public officer.

The indictment alleged—"that heretofore, to wit on the first day of January, A. D. one thousand eight hundred and forty-nine, and from thence continually afterwards, until and at the time of the committing of the offence in this count mentioned, William Baxter, late of, &c., was superintendent of the C division of the constabulary force of the county of Salop, (to wit) at the parish aforesaid in the county aforesaid, and that during all the time aforesaid, Dawson Mayne was the chief constable of the said constabulary force of the said county whereof the said William Baxter had notice, to wit at the parish aforesaid in the county aforesaid, and that during all the time aforesaid it became and was the duty of the said William Baxter, as such superintendent as aforesaid, weekly and every week to make and render a just, true,

and correct return in writing to the said Dawson Mayne as such chief constable as aforesaid of all sums of money received by the constables of the said division, and accounted for to the said William Baxter as such superintendent as aforesaid, as and for moieties of fines and penalties, and as and for fees and allowances for the service of summonses and the execution of warrants and for the performance of such occasional duties as had been performed by the said constables of the said division, and which might have been required to be performed by the local constables appointed under the provisions of the statute in such case made and provided, (to wit) at the parish aforesaid in the county aforesaid, and that heretofore (to wit) on the twelfth day of July, A. D. one thousand eight hundred and forty-nine, Joseph James then being one of the constables of the said division had received and was then possessed of a large sum of money, (to wit) the sum of 2l. 3s. 6d., as and for moieties of fines and penalties, and as and for fees and allowances for the service of summonses and the execution of warrants, and for the performance of such occasional duties as had been performed by the said constables of the said division, and which might have been required to be performed by the local constables as aforesaid. And that the said Joseph James as such constable as aforesaid, on the day and year last aforesaid, at the parish of Wellington aforesaid, accounted to the said William Baxter as such superintendent as aforesaid, for the said sum of money so received by him as aforesaid, and then and there paid over the same to the said William Baxter to be correctly returned to the said Dawson Mayne in accordance with the duty of the said William Baxter as such superintendent as aforesaid. And the jurors aforesaid further say, that the said William Baxter, not regarding his said duty in that behalf as such superintendent as aforesaid, afterwards, to wit on the fifteenth day of July in the year last aforesaid, unlawfully, wilfully, fraudulently and deceitfully did make and render a certain weekly return in writing to the said Dawson Mayne as such chief constable as aforesaid, as and for a just, true, and correct return of all sums of money received by the constables of the said division, and accounted for to the said William Baxter as such superintendent as aforesaid, as and for moieties of fines and penalties, and as and for fees and allowances for the service of summonses and the execution of warrants, and for the performance of such other occasional duties as had been performed by the said constables of the said division, and which might have been required to be performed by the local constables appointed under the provisions of the statute in such case made and provided, whereas in truth and in fact the said return was not a just, true, or correct return in writing of all sums of money received by the constables of the said division, and accounted for to the said William Baxter as last aforesaid; but, on the contrary thereof, the said return was an unjust, false, and incorrect return in writing, in the matter (to wit) that the said return contained no statement or account what-

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ever of the said sum of 2*l.* 3*s.* 6*d.* so accounted for and paid by the said Joseph James to the said William Baxter as such superintendent as aforesaid, as he the said William Baxter when he so made and rendered the said return then and there well knew; and that the said William Baxter then and there unlawfully, wilfully, fraudulently, and deceitfully converted and disposed of the said sum of money to his own use, contrary to the duty of him the said William Baxter as such superintendent as aforesaid, to the evil and pernicious example of all others in the like case offending, and against," &c.

The indictment contained a second count with respect to the sum of 12*l.* 4*s.*, alleging that it was the duty of Baxter to render a weekly return to Mayne "of all sums of money received by the said William Baxter as and for moieties of fines and penalties from time to time imposed by magistrates of the said division of the said county in cases in which the said William Baxter was the informer, to wit, at, &c., and that heretofore, to wit on the thirteenth day of March in the year aforesaid, William Liddle then being clerk to the said magistrates at Newport in the county aforesaid, had received and was then possessed of a large sum of money, to wit the sum of 12*l.* 4*s.*, before then imposed by the said magistrates of the said division of the said county as and for moieties of fines and penalties, in cases in which the said William Baxter was the informer; and the said William Liddle as such clerk as aforesaid, on, &c., at, &c., paid over to the said William Baxter the said lastmentioned sum of money to be correctly accounted for and returned to the said Dawson Mayne, in accordance with the duty of the said William Baxter as such superintendent as aforesaid," and then proceeding as in the first count to allege the defendant's fraud and deceit in not accounting to Mayne.

To this indictment the prisoner pleaded guilty.

Greaves, addressing the learned judge, said he thought he might say that the object of this prosecution would be perfectly satisfied, under the circumstances, if punishment were awarded to the prisoner on the indictment for the common law misdemeanor, without reserving any point for the opinion of the judges on the indictment for embezzlement.

PATTESON, J., addressing the prisoner, then said, he thought that, under the circumstances, the best course would be for him to pass sentence without reserving the points which had been raised. On the indictment for embezzlement, the sentence of the court was that the prisoner be imprisoned for one day. With respect to the other indictment, to which he had pleaded guilty, it would have been his duty to have passed, perhaps, a somewhat severe sentence, by way of example, if he had not received a very good character, because it was very necessary that persons in such a situation as that which had been occupied by the prisoner, should know that the accounts which they kept should be quite regular and straightforward, so that there should be no doubt as to the honesty of those through whose hands money passed. He must

say it was a very wrong practice (and he hoped that none of the other superintendents would continue it) to have running accounts between themselves and the constables; that they should settle every week, because it was a great temptation for any constable who happened to want money, to keep sums back, and then he might be charged with embezzlement and fraud. He thought it would be sufficient, in the present case, if he passed a somewhat light sentence, which was that the prisoner be imprisoned for three months, without hard labour.

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NORTHERN CIRCUIT.

YORKSHIRE SUMMER ASSIZES, 1851.

(Before Mr. JUSTICE WILLIAMS.)

July 29.

REG. v. BRUMBY.

Larceny—Assault—7 & 8 Geo. 4, c. 29.

Clover is "a cultivated root or plant used for the food of man or beast" within the 43rd section of 7 & 8 Geo. 4, c. 29, and therefore the subject of larceny.

WILLIAM BRUMBY, the younger, and John Brumby were charged with having, in Branlingham, in the East Riding, on the 15th June last, stabbed, cut, and wounded William Hill, a police officer, with intent to prevent their lawful apprehension. There was a second count, which charged them with cutting and wounding the prosecutor, with intent to do him some grievous bodily harm.

Seymour, for the prosecution, and

Dearsley, for the prisoners.

It appeared that the prisoners, who are two respectable young men, carried on their business as fishmongers by taking fish in a light spring cart between Hull and Welton, and selling the fish at those places and the intermediate villages. On the evening of the 15th of June last, having been occupied all day in their business, they were passing through the parish of Branlingham, and their

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horse being tired, they pulled up, and getting over a hedge into a clover field, they cut a little clover to give to their horse. The farmer who owned the clover field, having had a good deal of clover stolen, had set the prosecutor and another man to watch, which they were doing when the prisoners came to cut the clover. The prosecutor and his assistant immediately attempted to take them into custody on a charge of stealing the clover, whereupon the prisoners violently resisted, and William Brumby threatened that he would kill the prosecutor before he would allow himself to be taken. He then ran to his cart and got a large fish knife, and threatened to stick it into the prosecutor if he attempted to take him. The prosecutor upon this drew a pistol, and fired it at the prisoner, William Brumby, the bullet from which passed through his arm. William Brumby then struck the prosecutor on the head with the knife, and inflicted a very severe wound on his head. The prosecutor then drew another pistol, which he fired, but it having no bullet in it, did no damage. In the end, however, the prisoners were both captured.

At the close of the case for the prosecution, his lordship asked the learned counsel for the prosecution if he could refer him to any authorities in support of the 1st count of the indictment, which was for an assault with intent to prevent their lawful apprehension.

Seymour said that he had not drawn the indictment, and had not looked into the authorities.

Dearsley then submitted, on behalf of the prisoners, that the prosecutor had no right at common law to apprehend the prisoners, because at common law the severing growing clover from the freehold, and taking it away without suffering any time to intervene, so that it might be converted by construction into a chattel belonging to the owner of the field, was not a larceny, but only a civil trespass. Neither would the statute 7 & 8 Geo. 4, c. 29, s. 43, apply to the case before them; for by that statute it is enacted, "that if any person shall steal, or destroy, or damage with intent to steal, any cultivated root or plant used for the food of man or beast, &c., every such offender, being convicted before a justice of the peace, should be liable to be committed to gaol;" and as clover was not, as he (the learned counsel) submitted, a cultivated root or plant, it did not come within the statute.

His LORDSHIP said he would consider the point.

Dearsley then addressed the jury on the facts of the case, contending that the prisoners had a right to resist their apprehension, as the prosecutor had no legal authority to take them into custody. The question, therefore, for the consideration of the jury would be, whether the prisoners had resisted to a greater extent than was requisite to prevent their apprehension; and when they looked at the fact of the prosecutor having fired a pistol through the arm of one of them, it could not be said that they had resisted to too great an extent. The prisoners expressed their extreme regret at having taken the clover, which they admitted they had done to

refresh their tired horse, not imagining that they were committing a felony, and which, he submitted, they were not. The learned counsel then called several witnesses, who gave the prisoners excellent characters.

His LORDSHIP, in summing up, told the jury that they would take the law of the case from him, and that, in his opinion, clover was "a cultivated root or plant used for the food of man or beast," under the 43rd section of the 7 & 8 Geo. 4, c. 29, and that consequently the prisoners, by cutting it and taking it as they had done, had committed a larceny within the statute, and therefore the prosecutor had a right to apprehend them. They, the jury, would therefore direct their attention to the facts, and say whether, in their opinion, the prisoner William Brumby had cut and wounded the prosecutor with intent to prevent his lawful apprehension, or whether he was guilty on the 2nd count, which charged him with the cutting with intent to do grievous bodily harm.

The jury returned a verdict finding William Brumby guilty on the 1st count, and John Brumby not guilty.

His LORDSHIP then said he would consult Mr. Baron Platt on the point of law which he had decided, and consider before the end of the assizes whether or not he should reserve the point for the consideration of the Court of Criminal Appeal.

His LORDSHIP then sentenced William Brumby to six months' imprisonment with hard labour.

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Ireland.

DUBLIN COMMISSION COURT, 1851.

(Before PIGOT, C. B., and MOORE, J.)

REG. v. MOONEY.

Evidence—Dying declaration—What sufficient knowledge of the approach of death to constitute such declarations evidence.

It is not sufficient that the person making declarations was dying, to constitute those declarations evidence unless deceased was clearly and expressly warned that he could not live, or unless he had expressed his knowledge that he was dying.

THIS was an indictment for manslaughter. From the evidence it appeared, that the prisoner and deceased, his wife, had been for some time previously on very good terms; that on the night on which it was alleged that the crime had been committed they had retired to bed without any quarrel or altercation, although the prisoner had been slightly inebriated. The other lodgers in the house had heard no disturbance during the night, and on the next morning the husband went to his work as usual, at six, a.m. The deceased, on getting up in the morning, complained of a pain in her stomach. She had several times before made similar complaints, and was at the time *enceinte*. She went to the hospital, and the medical attendant ordered her to be taken into the accident ward. She had made no complaint of ill usage by her husband. The doctor told her she was dangerously ill, and ordered that the clergyman should be sent for. No person had told her expressly that she was dying. The clergyman had warned her to prepare for death. She had not told any person that she knew she was dying. She had been heard recommending her soul to God. It was proposed to give in evidence her declarations under these circumstances.

PIGOT, C. B.—These declarations would not be evidence, unless she was under a clear impression that she was in a dying state. It must be proved, to the satisfaction of the court, that she was dying, and that she was aware of the fact. We cannot, therefore, allow these declarations as evidence.

There having been no proof of any violence or ill-usage by the husband, the jury acquitted the prisoner.

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

Ireland.

DUBLIN COMMISSION COURT, 1851.

(Before PIGOT, C. B., and MOORE, J.)

REG. v. MOONEY.

Quaker—Affirmation—Test—Practice.

When persons who have been Members of the Society of Friends, entertain conscientious scruples against taking an oath, their affirmation will be sufficient, no matter how great the distance of time since they may have left the society.

IN this case the principal witness for the prosecution, Mrs. Bewley, had made the affirmation directed by the statute to be made by Members of the Society of Friends. It appeared afterwards, that for some time back, the witness had left the society, and was no longer one of its members.

Curran, J. A., objected that the affirmation was not sufficient, and that the lady could not be prosecuted for perjury on such an affirmation.

THE COURT, after looking into the 1 Vict. c. 77, and the other acts on the subject, considered that the length of time since the person affirming had left the society was of no importance, and that it was sufficient if she had once been a member of the Society of Friends and entertained conscientious scruples to being sworn on the Testament.

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

Ireland.

DUBLIN COMMISSION COURT, 1851.

(Before PIGOT, C. B., and MOORE, J.)

REG. v. WALKER.

Practice—Application to postpone trial—Complaint against prison officials.

Where a prisoner states in his affidavit for postponement of his trial that, in consequence of the harshness of the governor of the gaol in which he is confined in refusing to allow him pens, ink, or paper whereby to communicate with his friends and prepare for his trial, he cannot procure witnesses whose names are given in the affidavit, and who are also stated to be necessary for his defence, the court will grant a postponement. The court will not entertain complaints of favoritism or harsh or improper conduct against the governor or other prison officials. The Court of Queen's Bench, or Board of Superintendence, is the proper tribunal to investigate such a charge.

IN this case the prisoner was indicted for a conspiracy. His trial had been postponed, from the last preceding sessions of the Commission, and he now applied for a further postponement. His affidavit set forth the names of a number of witnesses, whom he stated to be necessary for his defence. It then stated that a dispute having arisen between himself and another prisoner, the governor was referred to, when he gave directions that the prisoner should not be allowed pens, ink, or paper, and that even the paper which came about his parcels was taken away. That he had been refused permission to see his wife, unless at the common grating, and that he preferred to remain without communication with his family to bringing them in contact with all the other prisoners. That he had been convicted of a misdemeanor, and that his inability to pay the fine was the reason of his imprisonment. He also set forth other facts to show that indulgences were allowed to particular prisoners contrary to the rules of the prison.

PIGOT, C. B., after consulting with Moore, J.—All those statements with regard to the improper conduct of the officials we can only consider with regard to their bearing on the application for postponement of the trial. The Court of Queen's Bench have a general power of dealing with complaints such as this, and it is to them or the Board of Superintendence that any application must be made for investigating such abuses. The application for postponing this trial until the next sessions we

shall grant. Mr. Marcus, the governor, who was in court, having expressed a wish to explain the complaints made against him,

MOORE, J., intimated his intention of taking a copy of the affidavit and consulting his brethren of the Court of Queen's Bench as to the course they should take, when if Mr. Marcus had any answering affidavit made he should also lay it before them.

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DUBLIN COMMISSION COURT, 1851.

(Before PIGOT, C. B., and MOORE, J.)

REG. v. MORRISSY. (a)

Evidence—Assault—Threatening constable with fire arms.

Statements made in the prisoner's presence after his arrest, are not admissible to prove that a charge was made against him, and what it was. It must appear that, if not in the execution of his duty, an officer was known as such, to make a threatening resistance to giving up arms not justifiable.

THE prisoner was indicted for an assault upon George Phelan, a constable, in the execution of his duty. From the evidence it appeared, that on the night of 25th of August, 1851, the police constable was called upon to arrest the prisoner by the servant maid of a Mrs. Thornberry, near whose residence the prisoner was taken. On proceeding to arrest the prisoner, he threatened to blow the contents of a pistol, which he held in his hand, through the constable, and at the same time presented the pistol at him. After a struggle he was arrested and taken into Mrs. Thornberry's. At or before the time of the arrest there was no evidence of a charge having been made against the prisoner, and the servant girl had merely called on the constable to arrest the prisoner, saying that he had a pistol, but made no specific charge. It was after nightfall when the entire transaction took place, and it was not clear that the prisoner knew the constable to be an officer, as Phelan did not give him any intimation to that effect, and, from

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

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*Assault on a
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the darkness, he could not swear that the prisoner must have recognised him as a constable.

Smyly, Q.C., for the Crown, was proceeding to give, in evidence, statements made in the prisoner's presence after his arrest, to prove a charge against him of lounging about the house of Mrs. Thornberry after nightfall, and annoying the inhabitants, but was stopped by the court, who, after some consideration, rejected this proof as establishing the case for the prosecution, and the Crown, having no further evidence to offer, Pigot, C. B., directed the jury to acquit the prisoner.

OXFORD CIRCUIT.

WORCESTER SUMMER ASSIZES, 1851.

July 21.

(Before Mr. JUSTICE ERLE.)

REG. v. ATTWOOD. (a)

Confession—Inducement.

To caution a prisoner that what he said would be used against him on his trial, if committed, is not an inducement to him to make a statement so as to exclude that statement from being given in evidence on the trial.

THE prisoner was indicted for uttering, at Pershore, on the 16th of May, 1851, a certain forged order for the payment of the sum of 5*l.* 15*s.*, with intent to defraud one William Jeremy.

A police officer, who took the prisoner into custody, was called on the part of the prosecution. He stated that the prisoner made a statement to him, which he took down in writing, and the prisoner signed his name to it. Before he made the statement, the witness said, "I told him to be careful, it would be used against him on his trial, if committed by the magistrates."

On the statement, so signed by the prisoner, being tendered in evidence,

W. H. Cooke, for the prisoner, submitted that it was not admissible, in consequence of the terms made use of by the witness.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

Mr. Justice Maule had so decided with respect to precisely the same state of circumstances. Where a magistrate told a prisoner, "what you say will be given in evidence against you," Maule, J. said, it is not proper for a magistrate to tell a prisoner that what he says will be given in evidence against him. It has been held that, to tell a prisoner that what he says will be used against him or for him, is an inducement, and to say that it will be given in evidence against him, comes to the same thing, for the statement is made upon an understanding that it will be given in evidence; and it does not signify that he is told that it will be used against him, for if he is told that it is to be used at all, it may induce him to say something that he may suppose may make for him. It did not become necessary, however, to decide the point: (*R. v. Jones*, Gloucester Summer Assizes, 1843, sanctioned by Rolfe, B.; Gloucester Winter Assizes, December 15, 1843, in *R. v. Holmes*, 1 C. & K. 248.) (b)

ERLE, J.—Giving the proper force to expressions, treating language in its obvious sense, it is impossible to say that any inducement was held out to the prisoner to make any statement. I have not the least doubt of the admissibility of the evidence in this case.

The statement was accordingly put in, and the prisoner was convicted.

Skinner for the prosecution.

W. H. Cooke for the prisoner.

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(b) The case of *R. v. Jones* was cited from a MS. note of Mr. Greaves, Q. C.—[J. E. D.]

OXFORD CIRCUIT.

WORCESTER SUMMER ASSIZES, 1851.

July 21.

(Before MR. JUSTICE ERLE.)

REG. v. STANTON AND OTHERS. (a)

Statute 9 Geo. 4, c. 31—Conviction and imprisonment for assault in bar to subsequent indictment for felony.

The statute 9 Geo. 4, c. 31, provides (sect. 27) for the summary conviction of persons for common assaults and batteries, and gives power to two justices of the peace to order the offender to pay a fine, with imprisonment in case of non-payment, or, if the offence be not proved, or is of so trifling a character as not to merit punishment, to dismiss the complaint, and make out a certificate under their hands stating the fact of such dismissal, such certificate to be delivered to the party against whom the complaint was preferred.

Section 28 enacts, "That if any person against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted, shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for nonpayment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause," "Provided always (sect. 29), and be it enacted, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this act," &c.

Semble, that a conviction for an assault under the above statute, followed by payment of the fine or endurance of the imprisonment, may be pleaded in bar of an indictment for felony in respect of the same assault, charging an assault and wounding with intent to murder, &c.

THE prisoner, Samuel Stanton, together with Francis Tombs and two other persons, was indicted for feloniously assaulting and wounding William Tombs, with intent to kill and murder him. There were other counts in the indictment, alleging the intent to be to maim, &c.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

In the course of the trial, it appeared that the prisoner, Samuel Stanton, had been summoned by the prosecutor before two magistrates for this same assault and had been fined, and in default of payment of such fine, had been imprisoned in Worcester Gaol. A true bill had been subsequently found against the prisoners at the Spring Assizes for the felonious assault, upon which indictment they were now tried.

The jury acquitted the prisoners of the felony, and found them guilty of a common assault.

ERLE, J., inquired why the conviction by the magistrates had not been pleaded in answer to this indictment, in pursuance of the statute 9 Geo. 4, c. 31, s. 10. (b)

Skinner, for the prisoner Stanton, said that, independently of the fact that he was not instructed until after the prisoner had pleaded, there seemed to be a difficulty in pleading the conviction for the assault in answer to an indictment for the felony.

ERLE, J.—In my opinion the conviction would have been an estoppel to the indictment for the felonious assault and wounding, if pleaded, and although it has not been pleaded I am bound to consider the charge as having been already adjudicated upon, and the prisoner as having undergone the punishment allotted for it. I think the justice of the case will be answered by all the prisoners entering into their own recognizances to appear and receive judgment when called upon, and to keep the peace to the prosecutor for one year.

The prisoners entered into their recognizances accordingly in 40*l.* each, and were discharged.

Huddleston and *Lovesy* for the prosecution.

W. H. Cooke, for the prisoner, Francis Tombs.

Skinner, for Samuel Stanton.

(b) The statute 9 Geo. 4, c. 31, provides (sect. 27), for the summary conviction of persons for common assaults and batteries, and gives power to two justices of the peace to order the offender to pay a fine, with imprisonment in case of nonpayment, or, if the offence be not proved, or is of so trifling a character as not to merit punishment, to dismiss the complaint, and make out a certificate under their hands stating the fact of such dismissal, such certificate to be delivered to the party against whom the complaint was preferred.

Section 28 enacts, "That if any person against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause." "Provided always (sect. 29), and be it enacted, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this act."

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Conviction for
an assault bar
to indictment
for felony.

OXFORD CIRCUIT.

WORCESTER SUMMER ASSIZES, 1851.

July 22.

(Before Mr. JUSTICE ERLE.)

REG. v. WINNALL. (a)

Embezzlement—Servant—False accounting.

A person hired by a market gardener to do a day's work, and who is requested by his employer to take some vegetables to market and sell them, and bring back the produce, is a servant to his employer in respect of such employment, within the statute 7 & 8 Geo. 4, c. 29, s. 47, defining the crime of embezzlement.

The prisoner, being employed as above mentioned, sold four pots of potatoes, and received the money. He sold four other pots, but did not receive the money. On his return to his master, he stated correctly the price he sold the potatoes for, but said that he would settle with him on a subsequent day, as he had not received the money, and did not offer the sum received, or say he had been paid for a part, and subsequently made the same excuse, and never paid any part of the money.

Held, that this was not embezzlement, unless the prisoner, when he said he had not received the money, meant that he had not received any part of it.

THE prisoner was indicted for embezzling, at Kidderminster, on the 28th of June, the sum of 25s., the moneys of John Lewis, his master, with intent to defraud him of the same.

The prosecutor stated that he was a market gardener, living at Kidderminster. On Saturday, the 28th of June, the prisoner was in his service; witness employed him to take eight pots of potatoes and eight dozen of cabbages, to sell at Dudley, or on the road there, as he best could. He went with them, and witness saw him on his return in the evening; witness asked him for the money; the prisoner said he would settle for the potatoes and cabbages on the following Tuesday, as he had not received the money. He said what sum he had sold the potatoes for, viz., 6s. 3d. a pot. He mentioned the name of Thomas as having bought the potatoes; he did not mention any other name. He said he should have to deduct 3s. 6d. for some payments on my

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

account; that was a correct and proper deduction, which he had a right to make; witness did not see the prisoner again until the 11th of July; he saw him on that day at Hadley near Stour-bridge; witness again asked him to settle for the potatoes; the prisoner said he could not do so then, but would on the following day. He said he had not seen Thomas or received for the goods, but would do so. Witness said if the money was not paid on the following day, he should give the prisoner into the custody of the police. The prisoner did not pay the money, and he was apprehended on this charge. In answer to questions from the learned judge (the prisoner being undefended by counsel), the witness said he believed the prisoner had, in fact, sold some of the potatoes to a person named Thomas, and had not received the money from him. By information since obtained, the witness found that some of the potatoes were sold to another person. Witness hired the prisoner to work for him on the 28th of June, and when at work the witness asked him to take the vegetables and sell them. The prisoner was not in his regular service. He had worked for witness before. On Thursday the 28th they settled for the prisoner's work. The hiring on Saturday was a fresh engagement for the day only.

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ERLE, J. inquired whether the counsel for the prosecution thought that there was the relationship of master and servant subsisting at the time between the prosecutor and the prisoner, necessary to sustain the charge of embezzlement?

Best, for the prosecution, observed that a constant employment was not necessary, and referred to the case of *Reg. v. Spencer* (R. & R. 299), where the prosecutor, having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, give him an order to receive 2*l.*, which he received and embezzled; he was holden to be a servant within the meaning of the act 7 & 8 Geo. 4, c. 29, s. 47. The case of *R. v. Hughes* (1 Mood. C. C. 370) was also referred to, where a drover, who was employed to drive two cows to a purchaser, and receive the purchase-money, embezzled it, was holden to be a servant within the meaning of the statute.

ERLE, J. said, that certainly those decisions were so strong, that the case must proceed.

Elizabeth Fletcher was then called as a witness. She stated that the prisoner sold her four pots of potatoes on the 28th of June, at 6*s.* 3*d.* a pot, and that she paid him the sum of 25*s.* for them at the same time.

This was the evidence for the prosecution.

ERLE, J. observed, that the case appeared more like an omission to account than a false accounting. There was no false document—no statement by the prisoner that he had sold the potatoes for 4*s.* 3*d.*, or any other sum less than the real price obtained. The case can only go to the jury on the statement of the prisoner that he had not received the money. In summing up to the jury, his lordship said—this case seems to me much more like an accounting

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for money, and a default in payment, than a false accounting and embezzlement. It depends entirely on the construction you put on the statement of the prisoner, that he had not received the money. It appears that, as a fact, he had received the produce of part of the vegetables, but not for the other part, which remains unpaid now. When he told the prosecutor that he had not received the money, that statement was true if he meant to say that he had not received the money for the whole, but it was false if he meant to say that he had not received any part of it. The guilt of the prisoner depends upon that; for if he meant to embezzle and steal part of the money, he is guilty; if not, then you will acquit him.

Verdict, Not guilty.

OXFORD CIRCUIT.

SHREWSBURY SUMMER ASSIZES, 1851.

August 2.

(Before BARON MARTIN.)

REG. v. DAVIES. (a)

Misdemeanor—Evidence of distinct assaults—Practice at Central Criminal Court.

On an indictment charging a misdemeanor for an assault in attempting to commit a rape on A. B., with a count for an assault of the same nature on a different day on C. D., it is competent to the prosecutor, not only in law, but by ordinary practice, to give evidence of both assaults.

THE prisoner was indicted for an assault on his own daughter Rachael, on the 24th of June, 1851, with intent to ravish and carnally know her. The indictment contained a count for a similar assault on another daughter, Elizabeth Davies, on another day and month.

Evidence having been given of the assault on Rachael Davies, Elizabeth Davies was called, when—

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

Skinner, for the prisoner, objected to evidence of distinct assaults being given.

Powell, for the prosecution, submitted that it was the practice in indictments for misdemeanors to give evidence of distinct offences.

MARTIN, B., consulted Mr. Hemp, the deputy clerk of assize, and said, "I understand from the officer of the court, that it is the constant practice at the Central Criminal Court, to give evidence of distinct offences in such cases as the present. I shall therefore allow it to be given."

The prisoner was convicted on the first count.

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MONMOUTHSHIRE SUMMER ASSIZES, 1851.

August 8.

(Before Mr. JUSTICE ERLE.)

REG. v. PHILPOTTS. (a)

Perjury—Question of materiality—Evidence—Right of witness to refresh his memory from notes taken by another person—Notice to produce—Legal custody of documents—Client and attorney.

In an action of ejectment brought to recover leasehold premises the lessor of the plaintiff claimed title under C. J., the widow of W. J. W. J. held under a lease made to himself and R. M. jointly, R. M. being the survivor, and a surrender or conveyance from R. M. to C. J. being presumed. On the trial a copy of the will of W. J. was produced, and P., the attorney for the lessor of the plaintiff, swore that he had examined it with the original will, and also with the act of probate book. The evidence was objected to, and was ultimately withdrawn, the death of W. J. being proved aliunde, and admitted, the contents of the will having no bearing on the case, W. J. having no power to devise the property claimed.

Quære, whether the examination of the copy will, as sworn by P., was material to the issue, so as to support an indictment for perjury.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

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On the trial of the action of ejectment, notes of P.'s evidence were taken by counsel on behalf of the defendant, and handed to his attorney who was present and read them.

Held, that the latter might look at these notes and refresh his memory by them, in giving evidence as to what P. swore on the trial of the action of ejectment.

Held, also, that a notice to P. to produce the copy will was sufficient to let in secondary evidence of the contents of that copy, the document having been produced by him at the trial of the action.

THE defendant was indicted for perjury, alleged to have been committed on the 27th March, 1851, at Monmouth Assizes, on the trial of an action of ejectment, *Doe dem. Richards v. Lewis. Keating, Q. C., and Huddleston*, for the prosecution.

Allen, Serjt., and Gray, for the defendant.

Keating stated the case for the prosecution.—The defendant, Philpotts, acted as the attorney for Thomas Richards, the lessor of the plaintiff in the action of ejectment, tried at the last Monmouth Spring Assizes. That action was brought to recover possession of certain leasehold property. A lease of the premises was made in 1822 to two persons jointly, William Joseph, and Rhys Morgan, and the plaintiff claimed title under Rhys Morgan, the survivor. It became necessary, therefore, for the plaintiff to show that William Joseph, the other lessee, was dead. In the course of the case, an office copy, or what purported to be an office copy, of William Joseph's will was tendered in evidence, the presumed object of which was to show that Joseph was dead. It was objected that it could not be read in evidence as an office copy. Philpotts, the present defendant, was then called as a witness, and he swore that he had compared the copy produced with the original will. It was then objected that an examined copy was inadmissible. Mr. Justice Talfourd, the learned judge who presided at the trial, said, "You must have the probate of the will, or the act-book." Philpotts then swore that he had examined the copy produced with the probate and with the act-book. It was still objected that the evidence was inadmissible. The learned judge inclined to that opinion, but said if the evidence was pressed he would not reject it. Mr. Alexander, the leading counsel for the lessor of the plaintiff, said he would not press it then, and ultimately the evidence was withdrawn. The question would probably be raised on the present indictment, whether as the evidence was withdrawn, perjury could be assigned with respect to it. He would merely observe at present that various cases had been decided with respect to affidavits, and it was established that perjury might be assigned on an affidavit, although the affidavit was not actually used or could not be read in consequence of some defect.

Frank James was then called.—The witness stated that he was a partner in the firm of Charles and Frank James, solicitors, Merthyr Tydvil. He was present at Monmouth on the trial of an action, *Doe dem. Richards v. Lewis*. [The Nisi Prius Record

of the trial was put in the witness's hands, and identified.] He acted as the attorney for the defendant, and heard the opening speech of counsel. Title was claimed through Rhys Morgan, by deed. Philpotts acted as the attorney for the lessor of the plaintiff. A deed was produced by a witness named Llewellyn. It was the deed now produced.

John Holly Trip was here called, and the deed put in his hands. He proved the handwriting of the attesting witness, who was dead. It was a lease from Samuel Rhys to Thomas Rhys, to William Joseph and Rhys Morgan, as joint tenants, and was dated in September, 1822.

Examination of Mr. Frank James resumed.—Philpotts was sworn and examined as a witness. He produced a paper. It purported to be an office copy of the will of William Joseph.

David Roper was here interrogated as a witness. He stated that he was clerk to Messrs. Charles and Frank James. He served a notice to produce on the defendant, on the 23rd of July, 1851. The notice to produce was read. It was to produce a paper purporting to be an office copy of the will of William Joseph.

Examination of Mr. Frank James resumed.—The question was put to Philpotts, "Do you produce an office copy of the will of William Joseph?" The defendant said, "I produce it." I saw the paper and saw the handwriting; I knew by the handwriting that it came from the office of the Consistory Court, at Llandaff; the document was handed to the officer of the court; I cannot say whether that was before or after the defendant was sworn; my impression is that it was first tendered as an office copy will. It was then objected to, and the defendant was thereupon called and sworn. Mr. Whitmore, the barrister, took a note of the evidence in the absence of Mr. Phipson, the junior counsel for the defendant Lewis; I stood by while Mr. Whitmore wrote, and I afterwards, during the trial, took his note and read it; it stated accurately what Philpotts said. [The witness (Mr. F. James) was about to refer to Mr. Whitmore's note, when]

Allen and Gray objected.—Mr. Justice Talfourd, in a case of perjury, at Stafford Spring Assizes, would not allow a witness, who was a magistrate, to look at the note of the evidence taken by a brother magistrate to refresh his memory, although he was present at the time and saw the note taken.

ERLE, J.—The witness says he read Mr. Whitmore's note almost immediately afterwards. If a witness looks at a note within two days, it has been held sufficient to entitle him to refer to it to refresh his memory.

The witness then proceeded to state, looking at Mr. Whitmore's note, what the defendant Philpotts said at the trial. Philpotts swore that he examined the copy with the original will of William Joseph; the evidence was then objected to; Philpotts then swore that he had examined it with the probate and act-book. On cross-examination by Mr. Keating (who appeared for the defendant in the action), he said he could not state exactly when he made the

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examination; it was about a month before the trial, in the month of February; he further swore, on cross-examination, that he made the examination at the office of Mr. Stephens, the deputy registrar of Llandaff; that a clerk of Mr. Stephens, whose name he believed was Evans, was present, and also his (Philpotts') own clerk, Smith. My impression is that the evidence of Philpotts was afterwards withdrawn by the counsel for the plaintiff.

Cross-examined by *Allen*, Serjt.—The office copy was admitted as such by the defendant's counsel; I recollect Henry Prothero being called and examined as a witness for the plaintiff; I will swear to the best of my memory that Prothero was examined after Philpotts; after Prothero proved the death of Joseph, the fact of his death was admitted; Prothero proved it in this way: he did not know William Joseph, but he knew his widow, who was at that time Mrs. Saunders, having married again; I learned that Catherine, the widow of Joseph, continued in possession and receipt of rent of the property claimed, down to the time of her death; she married Saunders in 1839, and died in 1841. [It was here arranged that the further examination and re-examination of the witness should be reserved for the present.]

Alexander Fripp, called.—He said: I am a solicitor, and was subpoenaed as a witness on and was present at the trial of the action, *Doe dem. Richards v. Lewis*. The present defendant, Philpotts, was examined as a witness. Mr. Alexander first tendered a document as an office copy of the will of William Joseph; the judge made some remark that it was not admissible, upon which Philpotts was examined; he first swore that he examined the copy with the original will of Joseph; Mr. Justice Talfourd remarked that would not do, for if the original will was produced, it would not be evidence; Philpotts then swore that he examined it with the probate and act-book; he was thereupon cross-examined by Mr. Keating as to time and place; he first said he could not state exactly when he made the examination; he afterwards said it was about a month before the trial. He was asked whether it was in the then present month of March, or in February; after a pause, he swore it was in February, at the office of Mr. Stephens, the deputy registrar of Llandaff, with the clerk of Mr. Stephens, whose name was, he believed, Evans, and Smith, his own clerk, present; Prothero was called into the box before Philpotts, but I am quite sure that after Philpotts was examined, Prothero was recalled to prove the death of Joseph; the lessor of the plaintiff claimed title through Rhys Morgan, as surviving lessee, under the deed of September 1822; I understood he made a twofold claim under Rhys Morgan, and under the marriage settlement of Mrs. Saunders: I recollect the counsel for the defendant at the close of the plaintiff's case, saying that the plaintiff must be nonsuited, not having proved title from Rhys Morgan to Mrs. Saunders; the judge said he would presume a conveyance.

Cross-examined.—The counsel for the plaintiff on the trial were

Mr. Alexander, Mr. Sergeant Allen, and Mr. Gray. The lease of 1822 was put in. It was admitted and read. It was thrown across the table. Henry Prothero was then called. My impression is that he was not examined at that time. Mr. Gray tendered a copy of the will of Joseph. Prothero said he was a mason; he did not know William Joseph, but he knew Mrs. Saunders; my belief is that he said this after the copy will was tendered; the office copy was admitted as an office copy by a judge's order, but its admissibility was objected to. The objection appeared to take the plaintiff's counsel by surprise; Philpotts made a communication to his counsel. He was then examined, and stated that he had examined it with the original, and with the act-book. Mr. Justice Talfourd said he did not think there was a book. Philpotts said he had examined the will with the book. My impression is, that two books were spoken of; the will book, and the act book. Mr. Justice Talfourd said there must be probate or act book; he read a passage from Roscoe's Evidence. Nothing was said as to an examined copy of act book. The judge said, "I am against you as to the admissibility of this document; but if pressed it will be better to admit it." On his saying that, Mr. Alexander said he would withdraw it at present. It was never read; the evidence was not offered; the death of Joseph was admitted after the evidence of Prothero. The defendant called some witnesses. The plaintiff gave evidence of the receipt of rent by Mrs. Saunders, down to the time of her death. The plaintiff put in a settlement.

[It was here objected that the witness could not state what the deed was, but Mr. Justice Erle said, "You may always name an instrument; you may say it was a settlement."]

Witness continued.—This was a settlement on the marriage of Mr. and Mrs. Saunders; a deed of appointment was also put in. Hugh Lewis was a witness on the trial, and stated that he lived in a house under Catherine Saunders a great number of years, and afterwards as tenant to the defendant.

ERLE, J.—As I understand it, the lessor of the plaintiff claimed through Rhys Morgan, and he claimed through Catherine Saunders, and showed possession by Catherine Saunders within twenty years. The lessor of the plaintiff made title originally through Catherine Saunders and David Saunders as her husband, but properly the plaintiff claimed through Rhys Morgan, and he claimed through David Saunders, who claimed through Catherine his wife, and she, it is supposed or presumed, claimed through Rhys Morgan.

Joseph Huckwell, one of the deputy registrars of the Consistory Court of Llandaff, examined.—Mr. Stephens is joint deputy with me; the defendant Philpotts came on the 8th of February to the office; two clerks were present. He asked to see the will of William Joseph; I referred to the index, commencing with the wills of 1817, and also to the book of register of wills; I showed the defendant the book containing a copy of the will he asked for. He looked at it, and then asked for a copy of the will; I said a

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copy should be made; it was too late that evening; it should be sent on Monday. He said his clerk, who was with him, could copy it in ten minutes. I replied, that was not usual; a copy should be made on Monday; he asked for and paid the amount of charge; a copy was made on Monday and sent, I believe, by post, or taken to the defendant. I did not see the defendant any more after that day at the office, nor to my knowledge was he there; nor did he examine, to my knowledge, the original will, or examine the copy sent. The original wills are kept in the Cathedral. Wills are tied up in the Record Room in the first instance, in bundles extending over a period of three months; then, at the end of the year, they are brought to the office and copied, and then taken back, but not at any definite time. I think the clerks would not go down for the original will without my knowledge, if I was in the office or in the town. There is a fee payable for every search and examination of a copy with the original will; no fee was paid for such search or comparison of William Joseph's will. I should know if such an examination had been made in the regular course of the office, for if a fee had been received for an examination of Joseph's will, it would be brought to me, and I should enter it.—[The book was produced, and no such entry appeared in it.]—There is a book in which all acts of probate, and grants of administration are entered. That book is kept in the registry: it does not contain copies of wills. When a copy of a will is made, a certificate is usually added similar to the entry in the act-book, of the date of probate, and to whom administration was granted, but it is not a copy of the entry in the act-book.

On the witness being asked, "Did you put a certificate at the foot of the copy will of Joseph?"

Allen, Serjt., objected that evidence of the contents of the document could not be given without producing it. The notice to Philpotts to produce it, was, he apprehended, insufficient. The record of the trial, already in evidence, showed that he was not the attorney on the record. Charles Thomas Jones was the name inserted there as the attorney for the plaintiff. Philpotts therefore was merely agent for Jones, and he produced the document as his agent, or was merely a witness in the cause, and therefore the notice was improperly directed to him.

ERLE, J.—Philpotts was acting as an attorney. I shall take the evidence that he had the conduct of the cause. The London agent frequently puts himself down as the attorney for the party, instead of inserting the name of the country attorney.

Gray submitted that, even admitting Philpotts was the attorney for the lessor of the defendant, the document belonged to the client. An attorney may have a lien, but still the documents in a cause are the property of the client who should be subpoenaed or called upon to produce it. In a case which occurred at Hereford, *Reg. v. Hankins*, (b) which was also an indictment for perjury, an

(b) Reported *ante*, vol. 3, p. 434, and 2 Car. & Kir. p. 823; but the case was not cited from the Reports.

attorney was subpoenaed to produce a document. He stated that he had received it from the prisoner as his attorney in the conduct of a cause in the County Court, for perjury, at which the prisoner was indicted; that he ceased to be his attorney, but claimed a lien on the document; and it was held by Mr. Justice Coltman that the possession of the document was legally in the prisoner, and that the attorney was not bound to produce it, notice having been also given to the prisoner himself and his then present attorney to produce it, secondary evidence of the contents of the document were given.

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ERLE, J.—That seems rather to have been a question as to whether the delivery to the attorney was a privileged one, and could not be disclosed against his former client. In the present case my opinion is, that the document was in the possession of the defendant. He produced it as an attorney, and took it back, and secondary evidence of its contents may be given, notice to produce having been served on the defendant.

The examination of the witness was then resumed.—There was a certificate affixed to the copy will. I should not have signed my name to it unless there was. Three or four weeks after the defendant's committal by the magistrate, I went to the Record Room to look for the original will; I found it there. I should not have expected to find it if it had been taken into the office in the month of February previously.

Evans and Morgan, clerks in the office of the deputy registrar of Llandaff, confirmed the evidence of the last witness, and proved that the defendant did not and could not have examined and compared the copy with the original will, or with the act-book.

Mr. J. H. Tripp was recalled.—He stated that Mr. Justice Talfourd said, when the copy will was produced, that it was not a copy of the act of probate.

This was the case for the prosecution.

Allen, Serjt., submitted that there was not sufficient proof to go to the jury, and that it was incumbent on the prosecution to show that the document was in fact a copy of the will of William Joseph.

ERLE, J.—The evidence of that is the defendant's own statement, that the document he produced was a copy of the will.

Allen, in the next place, objected that there was no materiality. The question as to the examination of the copy will was not material. What was the issue between the parties? The question was, whether Catherine Saunders had a disposable power over the property sought to be recovered. She was proved to be in the receipt of the rents, and the lessor of the plaintiff claimed under deeds of Catherine Saunders and her husband in 1837 and 1841. The claim on the other side was under a deed by Catherine Saunders before marriage.

[ERLE, J.—It is perfectly clear that the *contents* of the will were immaterial.]

Gray followed on the same side.—Many things may be sworn

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on a trial which are not material. Here the allegation is that the defendant swore that a paper writing was a copy of something else, and that copy was withdrawn from the jury, or not submitted to them. It was, therefore, immaterial. If a witness is called, and asked, "did you see A. B. execute that deed," and he answers "yes," and the deed is afterwards withdrawn, can an indictment for perjury be sustained? A question only becomes material when it is laid before a jury, because it is then material—material for what? Why, material for the jury. Proceeding from the general proposition, another view must be taken of this particular case, namely, that it could not have been a material question in the cause. The witness swears first, that he examined the document with a copy of the will in the book. That could not be material. The copy is not the probate. Then he swears that he examined it with the original will. That would not be evidence. Mr. Justice Talfourd had so held. Then it is said he swore that he examined it with the act-book. That is immaterial. The act-book is evidence, but a copy is not evidence. Mr. Justice Talfourd said, "probate is the proper evidence. If you only want to prove the party executor, the act-book is evidence." The act-book clearly is not evidence for any other purpose. It was immaterial in this case to prove that the party was executrix. If the act-book itself had been in court, it would have been immaterial to show who was executrix. [ERLE, J.—What really was the meaning of tendering the document?] It was with reference to something that was in the will itself. It was a notion that the will devised the property to Joseph's wife. [ERLE, J.—It is perfectly clear that such devise could not be material, Morgan being the survivor. Moreover, the copy of the act-book does not give the contents of the will. I cannot see how the document was of any use in this case.] This case has been fully discussed in the Court of Common Pleas on a rule to set aside the verdict for the plaintiff.(c) He would merely add, that the act-book was not evidence of the death, and a judicial act is only evidence between the parties.

ERLE, J.—My own opinion is, that the law ought to be that whatever is sworn deliberately, and in open court, should be the subject of perjury, but that undoubtedly is very different from the law as it exists.

Keating, Q. C., contra, concurring in the position that the evidence must be material, it is submitted that it must be material to the case the party is putting forward at the time the evidence is given, and that Mr. Gray's test is not correct. Evidence may be the subject of an indictment for perjury, although subsequently withdrawn. The evidence here was undoubtedly withdrawn, but if pressed, if it could have been evidence for the jury, its withdrawal would not remove the liability to perjury. The same principle, as in cases of affidavits, applies to this case.

(c) See *Doe dem. Richards v. Lewis*, 20 Law J. 177, C. P.

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It is no defence, on a charge of perjury in an affidavit, that there is an omission in the jurat, so as to preclude its being used or received in evidence, for the perjury was complete at the time the affidavit was sworn. (d) But it is said that if received, it could not have been material. It is not necessary that it should be important; it is sufficient if it be evidence at all, however slight. The death of Joseph was material. It was a necessary step, without proof of which the lessor of the plaintiff could not safely trust his case. He claimed through Catherine Saunders, but he knew all the circumstances. He did not merely put up his case to be knocked down on the other side, but he presented his complete case. Suppose no evidence of Joseph's death had been given, could the lessor of the plaintiff have maintained his claim? He claimed under a post-nuptial settlement of Catherine and David Saunders, but the property having in 1822 been demised to Rhys Morgan and William Joseph jointly, it was necessary to show that Joseph was dead. The instrument under which the lessor of the plaintiff claimed was executed as late as 1837. Suppose the lessor of the plaintiff had showed in 1822 a lease to Morgan and Joseph, and the settlement on the marriage of the widow, and stopped there, if Joseph was alive, the plaintiff would have been defeated. [ERLE, J.—It was admitted on all hands that Joseph was dead.] Not until after the defendant's evidence. [ERLE, J.—Nobody wanted to show that Joseph's will was proved. What was wanted, was to get at the contents of the will.] Very likely at a subsequent stage of the case it became immaterial, but what must be looked to, is the time when the oath is taken. If when the evidence is tendered, it might be material, then perjury may be assigned. [ERLE, J.—Supposing the death was material, and the will was evidence to prove the death, a copy of the will would not be evidence, nor would the act-book. The act-book is merely a memorandum-book, not the act of probate. The act of probate is on the back of the will; therefore, if the book was taken as true, it would not be evidence.] The defendant swore that he examined the document produced with the act of probate. He must be taken to have sworn that he did examine it with the act of probate, whatever that was, and not with the book called the act-book, but which was not the act of probate.

ERLE, J.—If what the defendant swore did not make it evidence, how was it material? His saying "this is an office copy," did not make it evidence. Then, "I examined it with the original will," that did not make it evidence. Then, "I examined it with the act-book," neither was that evidence.

Huddleston, on the same side, referred to *Davis v. Williams* (13 East, 232, as cited in *Williams on Executors*), that an examined copy of the act-book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce the letters of administration.

(d) See the cases collected in *Russell on Crimes*, by Greaves, vol. 2, p. 607.—[J. E. D.]

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ERLE, J.—It appears to me that the document was not tendered for the purpose of proving the death, the plaintiff claiming title under Joseph's widow. The will itself was perfectly irrelevant, but I cannot say that the death of Joseph was totally unconnected with the case. The facts as they stand must go to the jury, and, if necessary, I will reserve the following points for the consideration of the Court of Criminal Appeal.

1. The objection that the evidence was not tendered for the purpose of proving the death of Joseph.

2. That the death was an undisputed fact, and the evidence was withdrawn.

3. With reference to the effect of the original will and act-book: that the book now produced was not the act of probate, and that as that was the book with which it must be taken the defendant swore he made the examination, neither the original book nor an examined copy would have been evidence.

Gray applied to have the point as to the sufficiency of the notice to the defendant to produce the copy will, also reserved for the Court of Criminal Appeal, but

ERLE, J., having no doubt about the point, declined to do so. He then summed up the evidence, and the jury returned a verdict of guilty. Sentence was deferred until after the judgment of the Court of Appeal on the points reserved.

OXFORD CIRCUIT.

GLOUCESTER SUMMER ASSIZES, 1851.

August 14.

(Before BARON MARTIN.)

REG. v. MABBETT AND ANOTHER. (a)

*Manslaughter—Duty of parents to provide food for their children.**If parents have not the means of providing proper food and nourishment for their infant children who are incapable of taking care of themselves, it is their duty to apply for the assistance provided by means of the poor laws.**A married woman who, having a child under such circumstances, wilfully neglects for several days going to the Union for the purpose of getting support for it, she knowing that such neglect is likely to cause the child's death, is guilty of manslaughter :**Semle, that she is so responsible, although her husband, having the means of supporting his family, neglects to do so, and the want of food is the result of that neglect :**But in order to constitute the criminal offence, there must be distinct proof of a continued abstaining from applying for relief for four or five days together.*

THE prisoners, John Mabbett and Hannah his wife, were indicted for the manslaughter of Sarah Mabbett, their infant child of tender years, by neglecting to provide it with proper food and nourishment, according to their duty in that behalf.

The following evidence was given for the prosecution.

Mr. Ponten, the relieving officer of the Poor Law Union, went into the prisoner's house, and there saw two of their children; one of them, a year old, was dreadfully emaciated. They attracted his attention at once, and he asked the female prisoner what she had been doing? She said she had done for them as well as she could. The witness wrote an order for the medical officer to attend. The prisoner at first said she would go. Witness told her that she had better not leave the children. She then said she would send her little boy. Witness sent a woman, and returned himself in an hour. He then asked the prisoner how she could account for the state of the children, and said he thought they had been starved.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

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She replied that her husband had not brought any money for a fortnight, and there was no food in the house. Witness looked round the house, and could not see any description of food. He left arrow-root, sugar, and bread, and told the prisoner to go to a neighbour, and get some milk to make up the arrow-root. She said she would do so. Witness asked her why she did not apply to him, as her husband left her so destitute, for he (witness) would have relieved her or sent her into the workhouse, as he had done before. She said she did not like to apply on account of her husband; and added, "you know about it." Witness understood her as not liking to have any steps taken against her husband. He had been proceeded against for leaving his family about a year before, but was not sent to prison. No application had been made to the Union for some time before. During the husband's illness in February previously, the family had been relieved. Two children died. One of them, Sarah, the same evening. There were other children apparently healthy; the eldest was seventeen years of age, and the youngest (next to the deceased children) was three years old. All these were old enough to eat potatoes. The prisoner told witness that her son Charles earned six shillings a week; Samuel, aged fifteen, four shillings; and William, aged eleven, three shillings a week, making a total of thirteen shillings. She told witness she had received part of the children's earnings. The general rate of wages for labourers at that time (harvest) was ten shillings a week. The male prisoner could not have failed to notice the condition of his children.

On cross-examination by the female prisoner, the witness stated that in February the husband had two shillings and seven loaves a week from the Union. Afterwards witness refused to give relief, because he heard the male prisoner had eight shillings a week from his club.

Watts, a police serjeant, stated that in consequence of information from the surgeon, he went to the prisoner's house; the woman was at home; Sarah, the dead child, was lying on a table; another twin child was then alive in a cradle. Witness asked when the child was taken ill? She said, "yesterday morning, at nine o'clock, it was taken with purging and vomiting, and died to day at nine o'clock." Witness left the house, and sent for the coroner. On his return he found the child in the cradle in a dying state. The two looked as if they were starved. Witness asked the woman if her husband had work? She said "plenty of work, but last week and part of the week before he was on the fuddle (*i. e.*, drinking), and spent all the money he had, and came home and took all he could find." She added, "we were three or four days last week without any food but potatoes, and some days without even them. Poor little things! with what I had, I could not support them; but I do not want the world to know what he is to me. The world will talk fast enough about it." Witness then went away. The husband was at work at that time; witness saw him in a field the same day.

MARTIN, B., here asked how the prosecution proposed to make out the case, if the female prisoner had not the means of supporting her children.

Skinner, for the prosecution, said the proposition he should submit was, that parents were bound to apply for relief if they had not the means of supporting their children.

MARTIN, B., inquired whether there was any obligation on the parents to go to the Union. Must not the receipt of money in their hands be affirmatively proved?

Powell, *amicus curiæ*, said that the law as to the liability of parents to support their infant children had been recently touched upon by Mr. Justice Williams in the case of *Reg. v. Bubb and Hook*, reported in 4 Cox's Crim. Cas. 455.

The report was handed to his lordship, and the case proceeded.

Marianne Blackwood, a lady living near the prisoner's cottage, deposed to the neglected state of the children. They were dirty, and appeared hungry. Witness spoke frequently to the mother about cleanliness, and afterwards about food; she sometimes said that she had fed them, at other times she said their state was the consequence of her husband's drunkenness. Witness proposed to and did take the children away, and had them washed and fed; they did well and throve for about six weeks, when the woman refused to let witness have them longer, and never came to ask her assistance. Witness consequently did not see the children until after their death, an interval of eight or nine months. The child Sarah, after its death, was not so large as it was before; the other children were healthy and strong.

Mr. Taylor, a surgeon, deposed that the immediate cause of Sarah's death was English cholera. The extreme emaciation would increase it; insufficient diet had a tendency to produce English cholera. Witness looked at another child, lying in a cradle; it was extremely emaciated. Sarah's weight was eight pounds two ounces; a new-born child weighs generally eight pounds. Witness was of opinion that insufficiency of food produced the symptoms which were the immediate cause of death. Medicine of a proper kind had been given to the children by a lady.

This being the case for the prosecution, Mr. Baron Martin said he would speak to Mr. Justice Erle, sitting in the other court.

Skinner said, he submitted that it was the imperative duty of parents, if unable to provide for infant children by labour, or out of their own resources, to seek for assistance.

MARTIN, B.—Yes; you say the parents are bound to apply to the Union or to private charity.

His Lordship then retired to consult Mr. Justice Erle. On his return, he said: I have read my notes to Mr. Justice Erle, and he is of my opinion, that there is not a particle of evidence against the husband. With respect to the wife, he thinks that a woman who, having a child, wilfully neglects for four or five days going to the Union for the purpose of getting support for it, she knowing that such neglect would be likely to produce the death of the

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child, it would be manslaughter. He thinks, however, that the circumstances of this case do not amount to that. There ought to be a distinct abstaining to go for several days, of which in this case there is no evidence, and therefore he thinks that I ought to direct an acquittal.

In summing up to the jury, his Lordship said:—There is no evidence against the husband at all, for although a man is responsible for what he says himself, he is not responsible for what others say of him. The man certainly appears to be morally guilty, as he was spending the money on himself that ought to have been applied to the support of his family. With respect to the woman, what the surgeon states is, that the child died of cholera or bowel complaint, and that want of food would produce that effect. There is no evidence that the woman had money or food. What is relied on in support of this charge is, that she did not apply to the Union. I have had the benefit of the opinion of Mr. Justice Erle, and he says, it is the bounden duty of all persons having children, when they themselves cannot support them, to endeavour to obtain the means of getting them support; and that, if they will wilfully abstain from going to the Union, where they have by law a right to support, and their children die, they are criminally responsible for it. Here the evidence of the woman's wilfully abstaining from applying for relief is not, in Mr. Justice Erle's opinion or in mine, sufficiently made out, and you will probably adopt the view of that learned judge, and acquit in this case.

Verdict, Not guilty.

There was a second indictment for the manslaughter of James, the other infant child, but no evidence being offered, a verdict of not guilty was taken accordingly.

OXFORD CIRCUIT.

GLOUCESTER SUMMER ASSIZES, 1851.

August 15.

(Before Mr. JUSTICE ERLE, at Nisi Prius.)

REG. v. LOVEDAY. (a)

*Traverse of an inquisition of lunacy—Practice—Right to begin.**On the traverse of an inquisition de lunatico inquirendo, the traverse alleging that the traverser is of sound mind, and the replication denies that allegation and concludes to the country, and issue is thereupon joined, the traverser has a right to begin.*

THIS was a traverse of an inquisition of lunacy. The traverse, filed 24th July, 1851, stated that by a certain inquisition taken at the shire hall in Gloucester, for the county of Gloucester, heretofore, to wit, on the 25th day of February, in the year of our Lord 1851, and (by adjournment) on the 26th and 27th and 28th days of the same month of February, and the 1st day of March in the year aforesaid, before Edward Winslow, Esquire, one of the commissioners of our said Lady the Queen, by virtue of Her Majesty's commission in the nature of a writ *de lunatico inquirendo*, under the Great Seal, bearing date the 28th day of January, then last past, to Francis Barlow and Edward Winslow, Esquires, the masters in lunacy, directed to inquire amongst other things of the lunacy of John William Loveday therein described as late of (&c.), on the oaths of T. F. (&c.) It was found that the said John William Loveday, at the time of taking the said inquisition, was of unsound mind, so that he was not sufficient for the government of himself, his manors, messuages, lands, tenements, goods, and chattels, and that he the said John William Loveday had been in the same state of unsoundness of mind from the 16th day of November, in the year of our Lord 1850, as by the said inquisition, together with the commission thereunto annexed, returned into the Chancery of our said Lady the Queen, at Westminster, and there now remaining filed amongst the records of the said court, may more fully appear. Afterwards, to wit, on the 4th day of April, in the year of our Lord 1851, before the Queen in Chancery, came the said John William Loveday,

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

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by, &c., and prays oyer of the said inquisition, &c. For plea, nevertheless, saith that he the said John William Loveday, at the time of taking the said inquisition and before that time, to wit, on the 16th day of November, in the year of our Lord 1850, was, and from thence hitherto hath been, and now is, of sound mind and understanding, and sufficient for the government of himself, his manors, messuages, lands, tenements, goods, and chattels, without this that he the said John William Loveday, at the time of taking the said inquisition, was, or now is, of unsound mind, so that he was, or is not, sufficient for the government of himself, his manors, messuages, lands, tenements, goods, and chattels, or any or either of them, and that he the said John William Loveday had been in the said state of unsoundness of mind during the said space of time from the said 16th day of November, in the year of our Lord 1850, or any part thereof, in manner and form as by the said inquisition is above found; and this the said John William Loveday is ready to verify, wherefore he prays judgment, and that the said commission, return, and inquisition thereupon taken may be vacated and discharged; and that the hands of our said Lady the Queen may be removed; and that the said John William Loveday may be restored to the government of himself, and to the possession of all his manors, messuages, lands, tenements, goods, and chattels; and that he, under colour of the said inquisition, may be no further molested: but from the premises may be wholly discharged by this court, and so forth. Replication 28th July, 1851. And Sir A. E. J. Cockburn, Knight, Attorney-General of our said Lady the Queen, who prosecutes for our Lady the Queen, saith that the said commission, return, and inquisition thereupon taken ought not to be vacated and discharged; nor ought the hands of our said Lady the Queen to be removed; nor ought the said John William Loveday to be restored to the government of himself and to the possession of all his said manors, messuages, lands, tenements, goods, and chattels, or wholly discharged as aforesaid: because, he says, that the said John William Loveday, at the time of taking the said inquisition, was, and still is, a person of unsound mind and not sufficient for the government of himself, his manors, messuages, lands, tenements, goods, and chattels; and that he the said John William Loveday hath been in the said state of unsoundness of mind from the 16th day of November, in the year of our Lord 1850, in manner and form as by the said inquisition is above found; and this the said Attorney-General prays may be inquired of by the country, &c.

And the said John William Loveday doth the like. Thereupon, &c.

Allen, Serjt., and *Gray*, for the crown.

Keating, Q. C., and *Pigott*, for the traverser.

Gray, having opened the pleadings,

Pigott (b) claimed the right to begin. The right was with the

(b) The licence necessary to allow Keating, Q.C., to appear against the Crown, had not arrived.

traverser. The traverser had to satisfy the jury that he is of sound mind. The affirmative, therefore, lies upon him. This is not the case where a person is to be presumed of sound mind, for here he has been found of unsound mind.

ERLE, J.—Is there any decision—any case decided with reference to the point you now raise?

Pigott.—I have searched in the books of Crown Practice, and cannot find any authority. There was a case on this circuit, tried at Hereford (*Rex v. Bennett*), mentioned in Corner's Crown Practice, p. 201, with respect to another point, but no one has a recollection as to who began.

Allen, Serjt., *contra*.—I was in the case referred to, but I have no recollection of the facts. This case is analogous to an inquisition of a coroner.

ERLE, J.—In a writ of right, which is a traverse, the Crown began.

Gray observed, that the traverse here concludes with an *absque hoc*.

Pigott.—We allege that Loveday is now of sound mind, he verifies his plea, and the Attorney-General concludes to the country.

Allen, Serjt.—I now recollect that in the case referred to, tried at Hereford, those who supported the lunatic did not begin.

Pigott.—A new fact is alleged, viz., the present state of mind of the traverser. That is the material issue.

ERLE, J.—Actions against insurance companies, where the state of health of the assured is the question, appear to be analogous. I will consult Mr. Baron Martin sitting in the other court.

On his return, his Lordship said he had consulted his brother Martin, who thought the appellant or traverser had the right to begin.

An arrangement was subsequently effected, and a verdict by consent was taken, that John William Loveday, the traverser, "is now of sound mind."

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OXFORD CIRCUIT.

GLOUCESTER SUMMER ASSIZES, 1851.

August 13.

(Before BARON MARTIN.)

REG. v. WINBOW. (a)

Larceny—Property in inhabitants of a county—Stat. 7 Geo. 4, c. 63.

A room attached to a shire-hall, and built and used for the purpose of a ball and concert-room, is within the stat. 7 Geo. 4, c. 64, s. 5, which provides, that in any indictment for any felony or misdemeanor, committed in, upon, or with respect to any court, &c., or other building erected or maintained at the expense of any county, in, on or with respect to any goods or chattels, provided for or at the expense of the county, &c., to be used in or with any such court, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, &c.

A chandelier, which had been used as a fixture in the ball-room, and subsequently removed to another part of the building, but not used for any purpose, is also within the same statute, and is properly described as the property of the inhabitants of the county.

A hall-keeper, appointed by the justices, is not bailee of any of the contents of the shire-hall, but is the servant of the inhabitants, and, if he converts to his own use any of the property committed to his care, he may be indicted for larceny.

THE prisoner, Samuel Winbow, was indicted for stealing in that part of the parish of St. Nicholas which is in the county of Gloucester (namely, the shire hall of the said county), seventy pounds weight of brass, the property of the inhabitants of the county of Gloucester.

It appeared from the evidence that the prisoner was appointed by the magistrates as the keeper and resident attendant of the shire hall. Some alterations having been made in the ball and concert-room, forming a part of the whole building, a brass chandelier, which hung from the roof of the room, was taken down and laid aside with other property in a room of which the prisoner had the key. The chandelier was subsequently, at a considerable interval of time, sold by the prisoner as old brass, without the

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

knowledge or sanction of the magistrates, and the money applied by the prisoner to his own use. It was for the alleged larceny of this brass that the prisoner was now indicted.

At the close of the case for the prosecution,

W. H. Cooke, for the prisoner, objected that the property was not rightly described as in the inhabitants of the county of Gloucester. The statute 7 Geo. 4, c. 64, s. 15, which vested certain property in the inhabitants of a county, enacted, "that in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building erected or maintained in whole or in part at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division, and it shall not be necessary to specify the names of any of such inhabitants." The ball-room or concert-room, he submitted, was not within the statute. That mentioned "court or other buildings," meaning buildings of a like public character. It could not be said that a ball-room was a part of the court, or a building *ejusdem generis*. The brass chandelier was a fixture intended and used for the ball-room. In the next place, the chandelier was not in use at the time. It was abandoned for all purposes connected with the county structure, consequently it did not come within the definition or words of the statute, which applied to chattels either used in the making, altering, or repairing buildings, or to be "used in or with any such court or other building."

MARTIN, B.—I think that this ball-room is clearly a building within the act of Parliament, and the chandelier was also within the statute.

Cooke then objected that the prisoner was bailee of the property, and not a servant. He had the custody of the hall, and there was no relation of master and servant subsisting between him and the inhabitants of the county.

MARTIN, B.—The hall-keeper was clearly not bailee of any article in the hall. He was placed there as a servant by the justices acting for the inhabitants of the county, and the statute makes the inhabitants *quasi* a corporation.

The prisoner was ultimately acquitted.

Skinner, for the prosecution.

W. H. Cooke and *Guise*, for the prisoner.

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Larceny—
Property.

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COMMISSION OF OYER AND TERMINER FOR
THE COUNTY AND COUNTY OF THE CITY OF
DUBLIN.

AUGUST SESSION, 1848.

August 14.

(Before PIGOT, C. B., and PENNEFATHER, B.)

THE QUEEN v. O'DOGHERTY. (a)

*Comments in a public newspaper on proceedings in a court of justice—
Contempt of court—Order prohibiting comments on the proceedings
of the court—Affidavit—Practice.*

*Any comments in a public newspaper calculated to excite feelings of
hostility towards persons who are liable to be tried on a criminal
charge, are a contempt of the court in which the proceedings are
pending.*

*Where an article appeared in a public newspaper, commenting on the
disagreement of a jury in a criminal case in this court, in a manner
calculated to influence against the accused the minds of persons who
might subsequently be called on to act as jurors in that and other cases
of a similar nature, which were pending, the court refused to attack
the publisher, only one such article having appeared, and no previous
warning having been given to the public press to abstain from com-
menting on the proceedings, but highly censured the publication, and
made an order prohibiting the publication in any newspaper, of any
comments upon the proceedings of the session.*

*An affidavit in support of such an application, need not be entitled in
any cause.*

MR. KEVIN IZOD O'DOGHERTY, one of the proprietors
of *The Tribune* newspaper, having been tried in this court
upon an indictment framed upon the act for the better security
of the Crown and Government of the United Kingdom, the jury
having disagreed, the prisoner was detained in custody, and Mr.
John Martin, the proprietor of *The Irish Felon* newspaper, was
placed at the bar, and, having been arraigned under the same
statute, he pleaded not guilty, whereupon—

Butt, Q. C. (with whom was *Sir Colman O'Loughlen*), who was
counsel for Mr. O'Dogherty, as also for Mr. John Martin, requested
that Mr. O'Dogherty's attorney might be allowed to make an
affidavit, upon which, when it was before the court, he had an

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

important application to make; the clerk of the Crown accordingly swore *O'Rorke* (attorney), to an affidavit, and was about to read it to the court, when

Monahan, A. G., objected to any application being made in *Mr. O'Doherty's* case, while the case of *Mr. Martin* was being heard by the court.

Butt.—The application will apply equally to the case of *Mr. John Martin*.

PENNEFATHER, B.—As an application on behalf of *Mr. O'Dogherty*, it is *primâ facie* out of time.

Butt.—Well, then I make the application on behalf of *Mr. John Martin*, the prisoner at the bar, and I state solemnly that I should not feel myself in a position to defend any of the prisoners until this matter has been brought fully under your Lordship's attention.

Hatchell, S.-G., objected, that nevertheless the motion was irregular.

Butt.—If I am allowed to open the application, I will show that I have abundant precedents to support it, and that it is made at the right stage of the proceedings.

PIGOTT, C.B.—It would be as well that we should know the nature of it.

Butt.—It is an application for an attachment against an individual for what appears to me to be a high contempt of court, and one of the most audacious attempts to prevent the course of public justice that ever has been brought under the notice of a court.

Hatchell, S.-G.—That makes it the more important that every thing should be done regularly. This affidavit is not entitled in any cause. I suppose *Mr. Butt* has been instructed to state what he has, or otherwise he would not have done it. It may, however, turn out to be a most foul and slanderous libel, and if it should be deemed necessary to proceed against the party, it would be requisite that the affidavit should be properly entitled in any cause.

Sir Colman O'Loghlen.—It has a general reference, and applies to other cases pending in court, as well as to that of the prisoner at the bar. (b)

Butt.—I pledge myself to the court, that I make this application because I believe it to be necessary to the due administration of public justice in this court.

PENNEFATHER, B.—I apprehend, *Mr. Attorney-General*, that such an affidavit need not and ought not to be entitled.

Butt.—The application which I have to make is for an attachment against *Mr. Frederick William Conway*, the editor and proprietor of *The Dublin Evening Post*, on an order that he should forthwith attend and answer before the court the charge made against him. The affidavit upon which I move is as follows:—

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(b) Several proprietors of newspapers were at this period in custody, charged with the same offence as *O'Dogherty* and *Martin*, and then awaiting their trial.

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“Commission Court, Green-street.

“Edward O'Rorke, of No. 21, Blessington-street, in the city of Dublin, gentleman, maketh oath, and saith that he is the attorney of Kevin Izod O'Dogherty, at present a prisoner in the gaol of Newgate; saith that the said Kevin Izod O'Dogherty was on Thursday last placed upon his trial in this court, on a charge of publishing certain articles in a certain newspaper, called *The Tribune*, with the intent to depose the Queen, and to levy war against her; and deponent saith that said trial proceeded during the entire of said Thursday and the following day, and that upon the evening of Friday last the jury retired, and not being able to agree to their verdict were discharged by the court on Saturday morning; and deponent saith he has been informed and believes that it is the intention of Her Majesty's Attorney-General to put the said Kevin Izod O'Dogherty again upon his trial for the same offence at this present commission. And deponent saith that he has read in a certain newspaper, purporting to be published on Saturday evening last in this city, called *The Dublin Evening Post*, a certain article entitled 'The State Trials,' in reference to the trial of the said K. I. O'Dogherty, and the discharge of the jury without agreeing as aforesaid, and referring to what purported to be a report of the proceedings at said trial set forth in another part of said paper; and deponent saith that he believes said paper circulates extensively among the jurors of the city of Dublin, and that said article is calculated to prejudice the minds of the said jurors, and to intimidate them from the honest discharge of their duties, and deponent saith that the said article is more particularly calculated to prevent the said K. I. O'Dogherty from having a fair trial. And deponent saith that he is advised, and believes that said publication is a contempt of this honourable court; and deponent saith that he believes that one Frederick W. Conway, of 7, Suffolk-street, in this city, is the printer, publisher, and proprietor of said newspaper, and that deponent purchased at No. 7, Suffolk-street, in said city, a copy of said paper, which he has endorsed with his name, and annexed to this affidavit; and deponent saith that he is informed and believes that said No. 7, Suffolk-street, is the office and place of business of the said F. W. Conway.”

On Saturday evening last there appeared in *The Dublin Evening Post* a rather brief account, purporting to be a report of the trial of Mr. O'Dogherty, upon which followed this comment:—

“So large a portion of our space has been devoted to the proceedings at the Commission, in the case of Mr. Kevin O'Dogherty, one of the proprietors of *The Irish Tribune*, that we have little room for commenting upon that or any other subject.

“According to the present state of the law in this country and England—although the case is different in Scotland—the finding of the jury must be unanimous. The dissent of a single individual on the jury is sufficient to prevent a verdict. In the case of Mr. O'Dogherty there was dissent, and, consequently, there was no verdict.”

That is obviously an insinuation that there was but one dissentient juror.

"The reader will find all the proceedings reported in our columns—the publications fully set forth, which form the ground work of the indictment, under an act of Parliament, defining a specific offence, which is really treason, but which the milder construction of the statute has designated felony. There was no attempt at defence in the case, no more than in that of John Mitchel; and there was this difference between them, that *The Tribune* was still more unqualified in its incitements to treason and spoliation than *The United Irishman*, and the publication took place when the conspiracy, which had since broken out in actual rebellion, was much further advanced, and nearer to the point of explosion.

"Yet, there is no verdict in the case of *The Tribune*, whilst the insurrection which that journal laboured to promote has, we hope, been crushed by the vigorous measures of the government—whilst some of the leaders are in prison, others fugitives from justice, and some few offering to surrender, in the hope that the parties implicated may escape with their lives.

"This atrocious conspiracy was suffered to proceed so far, because we enjoy much more liberty than any other country in the world; and the penalty we paid for our freedom was the unavoidable sufferance even of seditious agitation, until it arrived at such a head that the British Constitution, with all its toleration of a certain degree of licentiousness, could allow it to proceed no further. The public safety demanded the suppression of an evil becoming hourly more perilous to the deluded people themselves, and more injurious to trade and industry, and the Government and the Legislature were compelled to act with decision. The lunatic attempt at rebellion, and the project of establishing Red Republicanism in Ireland, have been crushed by the overwhelming power of the government, and by the good sense and the loyalty of the great bulk of the population, including, we are happy to say, the farmers and the peasantry, with few exceptions, in the south of Ireland."

I pray the particular attention of the court to the concluding paragraph—

"But of what avail is all that power—all that loyalty and fidelity—all that determination to sustain public order, if the state of the law permits a sympathiser with the insurgents and their clubs to make his way into the jury-box, as the final arbiter and judge between the Crown and the party charged with treason? We know how extensively, in Dublin and some other towns, the infamous club system has prevailed amongst a portion of the middle class. Every one knows the strength of sympathy that exists in criminal political associations, and how all other considerations are overlooked, when such a bond of connexion has been established. The cry of the felon press about what is termed 'packing a jury,' means this, that the door of the jury-box should not be shut against their associates or secret sympathisers, who

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would enter the box determined, as they themselves express it, to 'eat their boots before finding a verdict.'

"We cannot now pursue this subject to its legitimate and inevitable consequences; but the evil is one for which a remedy must and will be found."

The obvious meaning of that article is this, that it was because the dissentient jurors were sympathisers with the insurgents and their clubs, there was no verdict, but it goes further; it not only states that the evidence was such that the jury ought to have convicted, but it alleges that no defence was attempted to be made for the prisoner. I will not say that that was a libel upon me, but it is a libel upon the administration of justice in this court. I did endeavour to defend the prisoner to the very best of my humble ability; and I believe I may say with perfect truth, though this paper alleges to the contrary, that had this prisoner been tried in ordinary times, when mens' minds were more calm and reasonable, it was a defence upon which the jury might have gone further and acquitted him. It was a defence not disparaged by the Crown, counsel or the court, and there is no reference whatever to the fact that a great question was left to the jury by the able and learned judge who tried the case, (c) in a charge the impartiality of which must have recalled back to every man's mind the days of Chief Justice Camden; is it to be tolerated that jurors are to be brought here to discharge a painful duty, and when they have discharged that duty honestly, and according to their conscience, that they are to be paraded in the public prints as sympathisers with insurgents and clubs, and unquestionably atrocious as such a libel would be in any publication, it is far more so when it appears in a newspaper which is supposed to have to a certain extent the confidence of the Irish Government, because, if the court will look into other articles in this paper they will see that it is laid down that it is the duty of the Government to arrest every person whom they suppose to be sympathisers with the insurgents. I ask your Lordships will you suffer in the present circumstances of the country, while these proceedings are going on, and after an intimation from the Attorney-General that this very day Mr. O'Dogherty might be tried by another jury, any paper to brand before the public, jurors who refused to find a verdict of guilty? This article is obviously calculated to prevent the administration of justice; it is almost unnecessary to quote authorities to show that this court has the power, without which, indeed, it would be impossible for it to discharge its high functions of committing for such contempt. The leading cases on the subject are to be found in the report of the trial of Thistlewood and others for high treason; (*Rex v. Thistlewood* (33 St. Tr. p. 716.) In that case the same evidence being about to be adduced against certain other prisoners as had been on former proceedings, the court deemed that it would be improper to publish the proceedings, and made an order to that effect. The

(c) Mr. Baron Pennefather.

printer of *The Observer* did print the proceedings. The Attorney-General brought the matter under the notice of the court, who ordered the printer to attend on a certain day. He did not, however, appear when called on, whereupon the court fined him 500*l.*, Chief Justice Abbott giving it clearly as his opinion that they had the right to do so on the ground that the acts of the party tended to interrupt the administration of justice. The printer, on whom the fine was imposed, having removed the proceedings to the Queen's Bench by *certiorari*, in the report of the case in that court (*Reg. v. Clement*, 4 B. & A. 218) there is a full discussion of all the cases, which fully establish the right of the court to interfere; there might be a question if the publication took place before the court was sitting, but there can be no doubt of the right of the court when the publication is during the sitting of the court, and is calculated to pervert the course of public justice. [PENNEFATHER, B.—There can be no doubt of the jurisdiction of the court.] A case somewhat similar to the present occurred when the present Chief Justice of the Queen's Bench was Attorney-General, in the case of *R. v. Barrett*, during the progress of which an article appeared in one of the Dublin newspapers, calling on the jury not to find the prisoner guilty, the Attorney-General applied for an attachment, and the court granted a conditional order, but the party kept out of the way, and the order was not served upon him. [PENNEFATHER, B.—That was before the trial.] It was, my Lord. In the present case, Mr. O'Rorke swears that the Attorney-General intimated his intention to put Mr. O'Dogherty again on his trial, and the person who wrote the article in question must have known that fact, therefore it is a direct attempt to influence the jury on the trial of a man who may be tried again. In 2 Atkyns, 469, Lord Hardwicke says, "nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in cases before the cause is finally heard." In the case of Thurtell for the murder of Mr. Weare, there was a representation in a theatre of a tragedy in which the circumstances of the murder were used, and the court granted an attachment against the party, being of opinion that such representations were calculated to interfere with the course of justice. Lord Hardwicke, in the case already referred to (2 Atk. 471), says "There are three different sorts of contempt—one kind of contempt is, scandalising the court itself; there may be likewise a contempt of this court in predisposing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the stream of justice clear and pure, that parties may proceed with safety both to themselves and to their characters." I apprehend, my lords, that you will have no difficulty in exercising the jurisdiction you possess, if you think that this article comes within it. It occurs to me that nothing can be

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more prejudicial to the administration of justice than that appeal to the jury, and the declaration that all the power of the Crown, all the loyalty of the people (in which I myself sincerely rejoice), and all the determination of the Government to preserve public order, will be of no avail if another jury disagree in this case. That is in itself an audacious attempt to pervert the administration of justice in this court; for there is a declaration that any man who exercises his duty honestly, is to be branded as a sympathiser in the cause of insurrection; and it becomes an intimidation when this journal purports to speak with the authority of the Government. It absolutely goes as far as this, that it warns the press against publishing leading articles, stating that they had better confine themselves to news, or otherwise the Government will seize their types. Recollecting that this paper professes to speak with all the authority of the Government, can your lordships conceive a grosser act of intimidation? I submit this application to the court on another ground—namely, of grossly misrepresenting the proceedings in this court. It is a gross misrepresentation to say, that no defence was made for the prisoner. Be the value of that defence what it may, it was one on which any jury might reasonably disagree; and now *The Evening Post* threatens the country, that if another disagreement takes place, measures will be taken to put an end to the evil: that is to say, that if another jury will not register the edicts of the Crown, the country will be deprived altogether of trial by jury. My learned friends with whom I am acting, thought we could not discharge our duty to the prisoners if we did not submit this matter to your lordships. For myself, holding as I do, by the favour of her Majesty, a certain rank at the bar, I think I would not do my duty to my Sovereign if I had not laid before the court this gross libel on her judges, and this attempt to prevent the purity of the justice administered in her name.

PIGOT, C. B.—With regard to this publication, we feel bound to say that it is not such a publication as ought to have been given forth to the readers of any journal at the period when it appeared; nothing can be clearer than that observations calculated to excite feelings of hostility towards any individual who is under a charge, and against whom proceedings are pending, especially when an investigation of that charge has taken place, and may be followed up by another;—nothing, I say, can be clearer than that, under those circumstances, such publications are not only an offence in themselves, but amount to a libel on the administration of justice itself; they are calculated to interrupt the course of justice—nay, to taint it to its very fountains; and if they have the effect of producing motives—either arising from intimidation or arising from excited prejudices—in the minds of jurors whom the constitution has made the judges of the guilt or innocence of the accused; they are, I repeat, not only a grievous offence in themselves, but amount to a contempt of court. With regard to this particular case, I am not aware of any instance since the trial of

one of those cases referred to by Mr. Butt, in which an application similar to the present was made; but, considering the circumstance of the time at which the proceedings which are now pending were brought into court, I do not say that it would not have been right in the court to have given that warning which appears to have been given by Lord Tenterden in the case of *Thistlewood*. And had such a warning been given as we shall now give, and had it been violated, we certainly should, and in case of such violation, undoubtedly we shall feel it our duty to interfere summarily against the party; I do not think, however, that this is a case in which we ought to interfere, in the manner in which we are called on to do; but we think it right to pronounce the censure of the court, and to declare its condemnation of any such attempts. Probably, in the warmth of discussion, the publisher may have been led beyond the limits which prudence, propriety, and a due regard for the law, would suggest, and we are not therefore prepared, upon this single publication, to adopt the summary proceeding which we are called upon to do; we, however, direct that no comment shall be made in any public newspaper, upon any of the proceedings connected with the present commission. I do not think it necessary, at this moment, to say more than just to express my own strong opinion—an opinion which I believe is fully concurred in by my learned brother—that there could not be a greater offence against public justice than so to apply the means at the disposal of the publisher of a public newspaper, as to influence those by whom the trials are to be conducted—as to influence the judges in whom is invested by law the power of determining the guilt or innocence of the accused—by any motive unconnected with the due performance of their duty.

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COMMISSION OF OYER AND TERMINER FOR
THE COUNTY AND COUNTY OF THE CITY OF
DUBLIN.*August 17 and 18, 1848.*

(Before PIGOT, C. B., and PENNEFATHER, B.)

REG. v. J. MARTIN. (a)

Practice—Contempt of court—Challenging a juror to fight.

A. B. having been convicted of an offence against the Act for the Better Security of the Crown and Government of the United Kingdom, shortly after the termination of the trial, a brother of the prisoner proceeded to the residence of the foreman of the jury by whom the prisoner was found guilty, accused him of having bullied the jury into finding the prisoner guilty, and challenged him to mortal combat: Held, that this was a contempt of the court before which the trial was had; and, Semble, that it was also an indictable misdemeanor, punishable by fine and imprisonment.

ON the 16th instant, John Martin was convicted in this court of an offence under the Crown and Government Security Act. On the following morning, Mr. Waterhouse, the foreman of the jury by whom the prisoner had been found guilty, informed the court that he had scarcely reached home on the previous evening when his servant informed him that two gentlemen wished to see him, upon which he went down to see them, and recognised one of them (Mr. James Martin, brother of the prisoner), as a witness who had been examined upon the trial of Mr. John Martin, on the previous day. He asked him if his name was Waterhouse; he replied it was; upon which Mr. James Martin said that he came to challenge him to mortal combat, for having bullied the jury in the case of his brother; that he denied in the most positive manner having done so, or that he had done anything but what he was bound to do by his oath—well and truly to try the case—and declined the challenge, but informed Mr. Martin that he would feel it to be his duty to give him into the custody of the police. Mr. Martin expressed his willingness

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

to accompany him, and eventually he proceeded to College-street Police-office, and charged Mr. Martin with challenging him to mortal combat.

Mr. Waterhouse further stated that afterwards, Mr. O'Rorke and Mr. John Martin, solicitor, called upon him, and expressed the great regret of Mr. James Martin's family at the outrage which had been committed upon him, and stated, as the only objection to Mr. Waterhouse mentioning it to the court, that it might be prejudicial to the person who had been tried, and in whose mind the conduct of his brother would produce the most painful impression. Mr. Waterhouse further stated, that nothing would have induced him to have mentioned the subject if he felt that his doing so would add to the mental or bodily pain of that gentleman; and also, that a letter had been just handed to him from Mr. James Martin, stating that, in a moment of great excitement, he had used language for which he was very sorry, which he retracted, and which he knew would cause great pain and vexation to his brother and family.

PIGOT, C. B.—Is Mr. Martin in the police-office now?

Mr. Waterhouse.—He is, my lord.

PIGOT, C. B.—Mr. Waterhouse has only discharged his duty in what he has done. If the person who has committed this outrage, as it unquestionably is, were not in the hands of justice, the court would call on Mr. Waterhouse to make an affidavit of the facts, in order that proceedings might be instituted for contempt of court, but as Mr. Martin is amenable to justice, the court does not think it necessary.

Mr. Waterhouse.—It is right to mention to the court that Mr. James Martin was, when he came to my house, in a state of extreme excitement, and I hope that the court will take that circumstance into consideration.

Butt, Q. C., who had been of counsel for the prisoner, stated that Mr. O'Rorke, his solicitor, would produce Mr. James Martin in court, at their lordships' pleasure, to answer for the great contempt which had been committed; and

O'Rorke stated, that as soon as he heard of the occurrence he proceeded to Mr. Waterhouse's residence, accompanied by another brother of the prisoner's, and his brother-in-law, and tendered an apology, and said that it was a subject for his discretion whether he would bring the matter before the court or not; that they attended at the earliest moment to tender an apology, and would enter into recognizances that Mr. James Martin would keep the peace.

Mr. Waterhouse.—Quite so.

PENNEFATHER, B.—Nothing can be more creditable than the manner in which Mr. Waterhouse has expressed himself. The friends of Mr. James Martin have also pursued a very proper and creditable course.

The court, after consultation, directed that Mr. James Martin should be in attendance at the rising of the court, and that the police magistrates should be informed of the course decided upon;

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that the attendance of Mr. Waterhouse should not be required at the police-office, and that Mr. James Martin was required to attend this court.

Mr. James Martin having accordingly been brought up before the court rose, it was ordered that he and Mr. Waterhouse should attend at the sitting of the court on the following morning, Mr. Martin being in the meantime admitted to bail, *O'Rorke* undertaking to produce him.

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Mr. James Martin being in attendance, *PIGOT*, C. B., addressing him, said:—The court has been informed by Mr. Waterhouse, one of the jurors by whom a verdict was given the day before yesterday, in the case of John Martin, that you repaired to his dwelling, and challenged him to fight, in consequence of his conduct as a juror in that trial. From what was stated to us yesterday, we thought that the more lenient course would be to allow you to appear here, and be informed of what was stated relative to your conduct, and hear what you had to say to the court on the subject. If the facts be contested, an affidavit of them will be made, and you shall have an opportunity to reply. If the facts are admitted, we shall proceed at once to deal with the case. Before you make any statement, you had better communicate with your legal adviser, and determine upon what course you will adopt.

After consulting with *O'Rorke* (solicitor), Mr. James Martin said that he extremely regretted what had occurred between himself and Mr. Waterhouse; that he admitted that he had used language that at any other time or on any other occasion he would not have used; and he now fully retracted it, as he had already done, and apologised for having made use of it; he also begged pardon of the court for any contempt he might have been guilty of, and was willing to receive whatever sentence the court might think proper to impose.

O'Rorke urged upon the court in extenuation, that Mr. James Martin had resided with his brother, who had been convicted, and to whom he was very much attached; that he was labouring under great excitement, and without speaking to any of his friends on the subject, proceeded directly from the court to Mr. Waterhouse's dwelling, and the young gentleman who accompanied him thought he was going to Mr. Waterhouse's to get him to press on the court the recommendation to mercy which the jury had put forward, and was ignorant of his object, and took no part in the transaction: this statement was confirmed by Mr. Waterhouse, who stated that he had only reached his house about five minutes before Mr. Martin arrived, and begged the court to consider the great state of excitement under which the young gentleman was labouring at the time.

PIGOT, C. B. (after conferring with *PENNEFATHER*, B.)—We are very glad to find, that by submitting as he has done, Mr.

Martin has so promptly atoned, as far as he could, for the violation of the law of which he has been guilty. It is fortunate for himself that he has done so, for, if that submission had not been made, whether he was proceeded against before the ordinary courts of law upon an indictment, or before this court for the contempt, and an interference with the administration of justice, he would most certainly be sentenced to a protracted incarceration, and a heavy pecuniary fine. It is important that there should be no improper interference with the administration of justice; and above all, that juries should be protected from every interference with them in reference to the discharge of their important and sacred duties; they form a portion of the tribunals by which the law of the land is administered. Judges have authority for protecting the proceedings which are essential to the administration of justice; but jurors, with infinitely greater risk, have no protection of their own, and must depend for it upon what the law affords them. It has been found necessary in the course of these proceedings to protect jurors (b) from all interference with them in the discharge of their duties, from all attempt to assail their characters or reputations, and from the imputation of motives other than those which should actuate men having such solemn and important duties to discharge: if it is necessary to guard their reputation, how much more necessary is it to guard their persons from outrage, and the consequences of threats of outrage to their persons or their houses. It is therefore necessary for the court, when such a case as this is brought before it, to exercise the powers which the law has vested in it for the protection of those engaged in the administration of justice; and above all, to protect jurors from intimidation and outrage. In this particular case, the person accused has been betrayed by sudden and excited feeling into a violation of the law. But it appears that immediately after he made a submission to the law, and acknowledged the offence with which he was charged; he at once submitted himself, and subsequently expressed his regret; he has repeated that expression of regret in this court; and although the court cannot in the performance of its duty, suffer such a case to go unpunished, it desires to mitigate to the fullest extent possible the punishment which shall be inflicted for the offence. Mr. Waterhouse has acted in a manner which is highly creditable to him as a man and as a citizen; it is difficult to say which is more conspicuous—the promptitude and manliness with which he has come forward to state the circumstances, or the generosity with which he has interposed to relieve Mr. Martin from the consequences of this act. Under all the circumstances, the court do not think it necessary to do more than order Mr. Martin to be committed for a period of one month, and that he shall enter into recognizances to keep the peace towards Mr. Waterhouse and all Her Majesty's subjects, for seven years; the amount of the recognizances to be, himself in 100*l.*, and two sureties in 20*l.* each.

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(b) See *Reg. v. O'Dogherty*, *ante*, p. 355.

COURT OF CRIMINAL APPEAL.

November 15, 1851.

(Before Lord CAMPBELL, C. J., PARKE, B., MAULE, J.,
TALFOURD, J., and MARTIN, B.)

REG. v. MURDOCK. (a)

Embezzlement—Venue.

The duty of a servant was to go into a neighbouring county, D., every Monday, and there collect moneys for his master, and to return to N., where the master lived, and to pay over what he had received on Saturday night.

The servant received money for his master in county D., but did not return to his master and account on the following Saturday. Two months afterwards his master met him in N., and asked him for the money, upon which he stated that he was sorry he had spent it :

Held, that there was evidence for the jury of an embezzlement in N.

THE prisoner was tried before Parke, B., at the last assizes for the county of the town of Nottingham, on an indictment for embezzling two sums, the property of his master, James Macqueen. The prisoner was a travelling salesman, and his duty was to go into Derbyshire every Monday, and to sell goods and receive the money for them there, and to return with it to his master, in Nottingham, on the Saturday. He received the two sums mentioned in the indictment, on the 6th of May, in Derbyshire, and did not return the following Saturday, nor at all, to his master's. There was no evidence of what became of him till two months after, when he was met by his master in Nottingham, who asked him what he had done with the money, and he said he was sorry for what he had done; he had spent it. The prisoner was found guilty; but as the learned judge doubted whether he could be properly convicted on this evidence of embezzlement in the town of Nottingham, he did not pass sentence; but reserved the case for the consideration of the judges: (See *R. v. Taylor*, 3 Bos. & P. 596.) No counsel was instructed on the part of the prisoner.

Manson, for the prosecution.—There was jurisdiction to try the prisoner in Nottingham. The fraudulent omission to account according to his duty in Nottingham, was evidence of embezzlement there: (*R. v. Jackson*, 1 Car. & K. 384.) (b) The receipt

(a) Reported by A. BITTLESTON, Esq. Barrister-at-Law.

(b) *R. v. Jackson*.—The prisoner was indicted for embezzlement. He was authorized to

alone is no offence, unless, as was put in *R. v. Hobson* (c) (1 East, P. C. Add. p. xxiv.), the denial afterwards is regarded as evidence that the original receipt was with intent to steal; and in that case there was a receipt in one county, a denial in another, and then, in effect, a second denial in the first county, in which it was held that the prisoner was properly tried. *R. v. Taylor* (d) 3 Bos. & P. 596) is also in point. Here the prisoner ought to have accounted on the Saturday night; and there is no evidence where he was at that time; but the reasonable presumption is that he had returned to Nottingham. Even if the felony was commenced in Derbyshire, it was not completed until he had returned to Not-

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receive money for his mistress, and his duty was, on the evening of every day, to render her an account of all that he had received for her in the course of that day, and to pay over the amount. He received on three different days three sums, which he neither accounted for or paid over. It was objected for the prisoner, that as he had not denied the receipt of those sums, nor delivered any written account in which they were omitted, he could not be convicted; but Coleridge, J., said, that if he wilfully omitted to account for and pay over, at the end of each day, according to his duty, the sums received in the course of that day, such wilful omission was quite equivalent to a denial of the receipt of the money.

(c) *R. v. Hobson* (1 East, P. C. Add. xxiv., and Russ. & Ry. 56).—The prisoner was indicted in Shropshire. He was authorized to receive, and did receive money for his master in that county. His master lived in Staffordshire, and the prisoner, on his return there, denied the receipt of the money. Some time afterwards the prisoner was sent by his master into Shropshire; and there desired a search to be made in the room where he was said to have received the money. Two questions were submitted to the judges; first, whether, under the repealed statute (39 Geo. 3, c. 85), an indictment might not be found and tried in the county where the money or goods were received, although there was no evidence of any other fact locally arising within the same county? Secondly, whether, if further local proof were necessary, the subsequent conduct of the prisoner in Shropshire was not sufficient to obviate the objection, as being an act in furtherance of the purpose of secreting or embezzling? A majority of the judges thought the conviction right. Lawrence, J., thought there was no evidence of embezzlement in Shropshire. The other judges were of opinion that he might be indicted in Shropshire, where he received, as well as in Staffordshire, where he embezzled the money by not accounting; but as the statute had made the receiving and embezzling amount to larceny, the offence was a felony in the county where the property was first taken; and that the indictment might be there or in any other county into which he carried it.

(d) *R. v. Taylor* (3 Bos. & P. 596; 2 Leach, 974; Russ. & Ry. 63).—The prisoner was indicted in Middlesex for embezzling 10s: and Lord Alvanley, C. J., in delivering the opinion of the judges said, "In the present case, no doubt can be entertained. The prisoner being sent over Blackfriars-bridge, into the county of Surrey, there received 10s. for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use, until after he had returned into the county of Middlesex. It was not proved that the money was ever embezzled until the prisoner was in the county of Middlesex. In cases of this sort, the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver to appropriate the things to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the whole offence in that county. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he received, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars-bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute, until he is called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could, with certainty, say that the prisoner intended to embezzle the money. In this case, there was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the statute, until he refused to account to his master. We are therefore of opinion that the prisoner was properly indicted in the county of Middlesex."

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tingham; and by 7 & 8 Geo. 4, c. 64, s. 12, if a felony is begun in one county and completed in another, the trial may be in either.

PARKE, B.—We do not know where the felony began in this case, because it commences with the fraudulent abstraction of the master's money.

LORD CAMPBELL, C. J.—The question reserved is, whether there was evidence to go to the jury of an embezzlement in Nottingham; and I must say that I cannot entertain any doubt that there was evidence, upon which the jury might have come to the conclusion that there was an embezzlement in Nottingham. The jury might, from the evidence, have supposed that the story told by the prisoner, of his having spent it before, was false, or that he had spent it in Nottingham.

Judgment.

PARKE, B.—Upon consideration, I think that there was evidence to go to the jury, of an embezzlement in Nottingham, by reason of his omission to return and account on the Saturday night, the non-accounting being evidence of his intention to embezzle. Lord Alvanley, in *R. v. Taylor*, says that the mere spending of the money is not sufficient of itself to constitute embezzlement, because the servant is not bound to pay over the identical money received, but may substitute other money to the same amount. It was held there, that if the prisoner spent the money in Surrey, and then came into Middlesex and refused to account there, that was evidence of embezzlement in Middlesex; until he had refused to account, the evidence of his intention to embezzle was wanting.

MAULE, J.—I agree in the conclusion at which Lord Campbell and my brother Parke have arrived; but as I do not agree in the view which the latter has taken of this case, I think it necessary to state the grounds of my opinion. It appears to me that there was evidence for the jury that the offence was committed when, in the town of Nottingham, two months afterwards the prisoner was met by his master, and being asked for the money, he did not hand it over. It was then his duty to have handed over, not the same money which he had received, but money to the same amount; and when he did not do so, he committed the offence. The mere non-accounting will not do, unless at the time of his refusal to account he is present in the county in which he is tried. The non-return with the money on the Saturday night would not do, because that would have happened if the prisoner had never come to Nottingham again at all. According to the view taken by my brother Parke, if the prisoner had received and spent the money in Derbyshire, and remained there six months, and been apprehended there, he would still have been triable in Nottingham; although he went into Derbyshire on a lawful errand, and never returned to Nottingham as long as he lived, yet, according to the opinion of my brother Parke, he would have been guilty of embezzlement in Nottingham. The confusion has arisen from not noticing that, in all the cases which say that the non-accounting is sufficient evi-

dence of embezzlement, there is the fact that the prisoner is tried in the county where he refused to account.

TALFOURD, J., concurred,

MARTIN, B.—I think that there was evidence for the jury; but, at the same time, it is quite clear to me that the embezzlement was not in Nottingham.

Judgment affirmed.

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COURT OF CRIMINAL APPEAL.

November 15, 1851.

(Before LORD CAMPBELL, C. J., MAULE, J., PLATT, B.,
TALFOURD, J., and MARTIN, B.)

REG. v. PHILPOTTS. (a)

Perjury—Evidence—Materiality.

Upon the trial of an ejectment, the title of the lessor of the plaintiff depended upon the fact that M. survived J. The will of J. was irrelevant to the title, but proof of the probate was relevant with reference to the time of J.'s death. A copy of the will of J. was tendered in evidence, and, on objection being made, the plaintiff's attorney falsely swore that he had examined the copy with the original, in the registry at Llandaff; and, upon further objection that the probate ought to be produced, or the Act-book proved, he further falsely swore that he had examined the memorandum at the foot of the copy with the entry in the Act-book. The judge then offered to receive the document, but the counsel withdrew it. The memorandum was, in fact, a copy of an entry in a book called "The Act-Book," but not a copy of the act of probate, so that the evidence, if true, would not have rendered the document legally admissible:

Held, nevertheless, that the attorney had sworn falsely in a judicial proceeding upon a material point, and was guilty of perjury.

THE following case was reserved by Erle, J :—

Upon the trial of the cause of *Doe dem. Richard v. Griffiths*, a copy of the will of William Joseph was tendered, and, on objection to its admissibility, the present defendant, who was then attorney for the lessors of the plaintiff, swore that he had examined the copy produced, with the original will, in the registry at Llandaff, and, upon further objection, that the original will was inoperative in respect of a chattel interest, and that, therefore, either the pro-

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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bate ought to be produced, or the Act-book proved, the defendant further deposed, that he had examined the memorandum at the foot of the copy of the will with the entry in the Act-book at the said Registry.

Upon this evidence the judge offered to receive the document in evidence, but the counsel for the plaintiff withdrew it.

Upon the trial of the present indictment, it was proved that the defendant had not made either of the examinations which he had so deposed to, and he was found guilty of perjury.

But I reserved the question whether the false oath was relevant and material to the issue being tried, so as to amount to perjury. As to which the following are the facts:

On the trial of the ejectment, the lessor of the plaintiff claimed to be entitled to a term which had been granted to William Joseph and Rees Morgan, jointly, and his title was, that Morgan had survived Joseph, and assigned the term to Catherine, the widow of Joseph, who married Saunders, and, on her marriage, made a settlement, under which that term vested in him. The will of Joseph was irrelevant to this title, but the time of his death was a material fact in order to prove that Morgan had survived him, and proof of the probate of the will of Joseph would thus have been relevant evidence towards establishing the plaintiff's title. The purpose of the plaintiff's counsel, in tendering the evidence, was to clear a doubt respecting the interest of Joseph in the term, which was expected to be raised by the defendant, and, after the document was withdrawn, the survivorship of Morgan to Joseph was clearly proved by other evidence for the plaintiff; but the purpose for which the document was offered was not stated at the time of the trial of the ejectment.

It further appeared that, at the Registry at Llandaff, it was the practice to indorse the act of probate on the original will, and that the book called the Act-book contained a daily account of the matters of business completed in the Registry, and that the memorandum at the foot of the document in question, was a copy of the entry in this book relating to the probate of the will of Joseph, and not a copy of the act of probate indorsed on the original will.

It follows that the examination of the document produced with the entry in the book called the Act-book, at Llandaff, did not render the document legally admissible as an examined copy of the act of probate.

Judgment was postponed, and the defendant was discharged on recognizance, with sureties to appear at the next assizes for Monmouth.

Gray, for the prisoner.—The question here is, whether the oath taken by the prisoner was in relation to a matter relevant to the issue. The will of Joseph was wholly irrelevant; but the probate was not, because the lessor of the plaintiff was bound to prove that Morgan survived Joseph. The evidence, however, of the prisoner, that he had examined the memorandum with the

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Act-book, turns out to be wholly immaterial, because the Act-book does not contain the judgments of the court granting probate, but only private memoranda of the business daily transacted in the Registry at Llandaff. [MAULE, J.—By swearing that he had made the examination, he enabled himself to raise a question as to the admissibility of the document.] But the evidence was not material to the issue. [MAULE, J.—Is that necessary? The evidence must be taken in a judicial proceeding, and must be material, but where do you find, that it must be material to the issue?] In *R. v. Benesech* (Peake, Add. Cas. 93), where perjury was assigned upon an answer in Chancery denying a promise, which, not being in writing, was void by the Statute of Frauds, and Lord Kenyon said, that “he thought this was not such a material fact as would support the indictment. This promise was absolutely void, and supposing it, in fact, to have taken place and been acknowledged by the defendant, could not be enforced either at law or in equity; that court had no power to decree a performance of it. It might be a false swearing, but did not amount to what the law denominated perjury.” So, in *R. v. Dunston* (R. & Moo. N. P. R. 109), where perjury was assigned upon an answer in Chancery, denying a parol agreement for the purchase of a freehold estate (the bill having been filed to compel a specific performance of that contract), Abbott, C. J., said:—“In the present case the defendants have in their answer pleaded the statute, and insisted that this agreement, not being in writing and relating to the sale of land, is within the 4th section of that statute, and cannot be enforced. * * * These defendants, therefore, having insisted upon the statute in their answer, the question is whether, under such circumstances, the denial of an agreement, which by the statute is not binding upon the parties, is material; I am of opinion that it was utterly immaterial. It is necessary that the matter sworn to and said to be false, should be material and relevant to the matter in issue. The matter here sworn is, in my judgment, immaterial and irrelevant, and the defendant must be acquitted.” It is not, of course, necessary that the evidence should directly and immediately relate to the matter in issue; it is sufficient if it goes to affect the verdict of the jury. Thus, in *R. v. Griep* (1 *Ld. Raym.* 256; *Salk.* 513), perjury was assigned upon a statement that an attesting witness to a lease and release was at a distant place at the date of it, and it was held that false evidence, given as to the credit of a witness, is perjury, though the judgment was arrested on another ground. It is essential to perjury that the false statement should be of some fact, which may mislead the judge or the jury in their decision. Now, here the fact sworn to was material neither to the decision of the judge or the jury. [LORD CAMPBELL, C. J.—The evidence was offered to induce the judge to admit the document.] Yes; but it was not a question of fact for the judge, whether the examination had or had not been made. It might subsequently, if it had been contradicted by the other side, have become a question for the jury;

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but it never arrived at that point. [MAULE, J.—A false statement in a judicial proceeding, material to that proceeding, is perjury. Here, the statement was made in a judicial proceeding, to induce the judge to receive evidence; and it attained the object, because the judge expressed his readiness to receive it.] The question reserved is, whether the evidence was material to the issue; and it clearly was not. The document, even if it had not been withdrawn by the counsel, was clearly inadmissible in point of law. [LORD CAMPBELL, C. J.—The withdrawal of it can make no difference, because we must look at the state of things when the false swearing took place.] If at that time the document was such that it could not legally be submitted to the jury, the false statement is not perjury. [MAULE, J.—But, suppose that the evidence had been received and submitted to the jury, would the defendant in that case have been guilty of perjury?] It must always be assumed that the judge will act legally. [MAULE, J.—Then, supposing a bill of exceptions to be tendered to the ruling of a judge as to the admissibility of evidence, the question, whether a witness committed perjury on the trial, may depend upon the ultimate decision of that bill of exceptions in the House of Lords.] There cannot, however, be perjury unless there be some tribunal which is to judge of the fact; and there was no such tribunal in this instance. [TALFOURD, J.—Suppose a judge to rule that an entry was necessary, to avoid a fine; and thereupon the attorney should get up and swear falsely to the necessary formalities; would he not be guilty of perjury, though it should turn out that the ruling of the judge was wrong?—MAULE, J.—Or, suppose that illegal evidence is admitted because no objection is made to its reception?] In that case it must be assumed that the evidence was legal and material.

Keating, contra, was not called upon.

Judgment.

LORD CAMPBELL, C. J.—According to the law, as it stood when the trial took place, in which this false swearing occurred, I am of opinion that the conviction is right. It is quite clear that the false swearing took place in a judicial proceeding; then, can it be said that it was with reference to a fact wholly immaterial to that proceeding? One great question was, whether Joseph died before Morgan; it was necessary to prove that he did; and the probate of Joseph's will, whilst Morgan was still alive, would be evidence of that fact. Then, an alleged copy of the probate was offered, and, to render it admissible, a witness swore that he had examined it with the Act-book, although he had made no such examination. The judge was prepared to receive it; and if he had received it, and rightly received it, though the death of Joseph was also proved by parol, it would have been corroborative evidence, and material to the issue. It was withdrawn; but the question, whether perjury had been committed, must depend upon the state of things when the witness left the box. This brings us to the question, whether it is less perjury if the document turns out not to be admissible in evidence, and the judge has done

wrong in admitting it. If that were so, it would, as has already been observed, make the commission of the offence depend upon the decision of a nice question of law upon a bill of exceptions in the House of Lords. Here the evidence was offered to procure the admission of a document; that document, if admissible, would be material to the question being tried; and the evidence was false. Here, therefore, are all the ingredients necessary to constitute the crime of perjury.

The other judges concurred.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

November 22, 1851.

(Before Lord CAMPBELL, C. J., ALDERSON, B., PLATT, B.,
TALFOURD, J., and MARTIN, B.) (a)

REG. v. CHEAFOR. (b)

Larceny—Pigeons kept in a dove-cote, with liberty of ingress and egress. Pigeons kept in an ordinary dove-cote, having liberty of ingress and egress at all times by means of holes at the top, may be the subjects of larceny.

AT the Quarter Sessions for the county of Nottingham, held at East Retford, on the 7th of July, 1851, the prisoner was indicted for feloniously stealing four tame pigeons, the property of John Mansell. The pigeons, at the time they were taken by the prisoner, were in the prosecutor's dove-cote, over a stable on his premises, being an ordinary dove-cote, and having holes at the top for the ingress and the egress of the pigeons, and having a door in the floor, which was kept locked. The prisoner entered the dove-cote at twelve o'clock at night, breaking open the door and taking away the pigeons. The prisoner's counsel contended that the pigeons being at liberty at any time to go in and out of the dove-cote, and therefore not reclaimed and in a state of confinement, were not the subjects of larceny. The chairman directed the jury that, in his opinion, the view contended for by the prisoner's counsel was correct, and that the

(a) The judges present, when the judgment was delivered; but the case was in the list for Saturday, Nov. 15, when Maule, J., was present, instead of Alderson, B.

(b) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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pigeons were not properly the subjects of larceny. The jury found the prisoner guilty of larceny; but judgment was postponed to ask the opinion of this court whether the learned chairman's direction to the jury was right, and whether the prisoner, under the facts stated, was properly convicted.

The case was not argued by counsel.

LORD CAMPBELL, C. J., delivered the judgment of the court. After reading the case, his Lordship said that they thought the direction of the chairman was clearly wrong. Pigeons must, from the nature of them, have free egress to the open air: and the question therefore was, whether there could be a larceny of tame pigeons? If not, neither could there be larceny of chickens, ducks, or any poultry. Whether they were tame or not was a question for the jury. *Luke's case* (Rosc. Cr. Ev. 577) is said by Mr. Greaves (c) to have been determined on the ground that the pigeons were reclaimed, not that they were shut up in boxes. It had been mistakenly supposed that Baron Parke had decided that pigeons were not the subjects of larceny unless strictly confined; there is no question that they are, even though they are allowed the liberty of going to enjoy the air when they please.

Conviction affirmed.

(c) The passage referred to is in 2 Russ. on Crimes, p. 83, as follows:—"Where pigeons were shut up in their boxes every night, and stolen out of such boxes during the night, Parke, B., held it to be larceny." Upon which, in Mr. Greaves' edition, there is the following note:—" *Luke's case*, Rosc. Cr. Evid. 577, and, *ex relatione*, Mr. Granger. The case was determined, on the ground that the pigeons were reclaimed; and not on the ground that they were shut up in their boxes at the time they were taken."

COURT OF CRIMINAL APPEAL.

November 22, 1851.(Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B.,
TALFOURD, J., and MARTIN, B.)

REG. v. KEY. (a)

REG. v. SHUTTLEWORTH. (a)

*Practice—Mode of proceeding upon indictment charging previous conviction—14 & 15 Vict. c. 19, s. 9.**When an indictment charges a previous conviction, the proper course is to arraign the prisoner upon the whole indictment, and, if he plead not guilty, then to swear the jury, and to charge them in the first instance to inquire only as to the subsequent offence, reading to them only that part of the indictment, unless evidence of character should be given on the part of the prisoner; but after he has been convicted of that subsequent offence, then, without reswearing them, to read the other part of the indictment to the jury, and charge them to inquire as to the previous conviction.*

THE following cases were reserved at sessions for the purpose of ascertaining the proper mode of proceeding under the recent act, 14 & 15 Vict. c. 19, s. 9, upon indictments charging previous convictions.

REG. v. KEY.

The prisoner in this case was indicted at the Michaelmas Sessions for the county of Leicester, held at Leicester, on the 13th October, for having stolen a coat; and there was another count in the indictment charging the prisoner with a previous conviction for felony. The prisoner, having been arraigned, pleaded not guilty; and having declined to challenge any of the jury, the jurors were sworn and charged in the usual way to inquire whether the prisoner was guilty or not. The jury, having returned a verdict of guilty on the first count, were then charged to inquire into the fact of the previous conviction; when it was contended by the counsel for the prisoner that the jury must be resworn to try the new matter; and the counsel for the Crown admitting that, according to the practice adopted on the authority of Parke, B., the jury must be resworn, the deputy-chairman, who presided, directed

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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that the oath, according to the form hereinunder set forth, should be administered to the jury. On the officer of the court proceeding to administer such oath, the counsel for the prisoner claimed the right of challenging the jury on the ground that the prisoner, when arraigned, had been told by the clerk of the peace that if he would challenge the jurors, or any of them, he must do so "as they came to the book to be sworn, and he should be heard;" that the jurors were then, for the purpose of trying the fact of the prisoner's previous conviction, "come to the book;" and accordingly, on the name of the first man of the jury being called, the counsel for the prisoner challenged him, and further intimated his intention of challenging in like manner each man of the jury who had convicted the prisoner on the first count of the indictment. The deputy-chairman disallowed the claim to challenge the jury on the grounds that the prisoner had been arraigned on the three counts, that his plea had been taken to the whole indictment, and that his right of challenge should have been exercised in the first instance, and before the jury were sworn to make true deliverance between him and our Sovereign Lady the Queen. The jury were then sworn as follows:—"You shall well and truly try whether the prisoner has been before convicted of felony in manner and form as in the indictment is alleged"; and the prisoner was given in charge to the jury on the third count of the indictment charging a previous conviction. He was found guilty, and sentenced to transportation for seven years; but, at the instance of the prisoner's counsel, the court reserved the following question for the decision of the judges, viz., whether, under the circumstances detailed in this case, the challenge made on behalf of the prisoner should have been allowed.

This case was not argued by counsel.

Judgment.

LORD CAMPBELL, C. J., in delivering the judgment of the court, said, the prisoner was arraigned in the usual, and, I think, proper manner; and the jury were properly charged in the first instance with that part only of the instrument which alleged the larceny. The prisoner was convicted, and then it was stated by the counsel for the prisoner that it was the practice of Baron Parke to direct the jury to be sworn afresh. I can only say that I have had the unspeakable advantage of travelling circuit twice with that learned judge, and that on those occasions he followed a totally different course. (b) The proper mode of proceeding is to arraign the prisoner upon the whole indictment; but to charge the jury with the subsequent offence only in the first instance, and after conviction of that offence, then to charge them with the previous conviction. In this case the jury were sworn afresh; and the pri-

(b) On the Midland Circuit, at the last Summer Assizes, 1851, when Baron Parke was accompanied by Maule, J., the practice of swearing the jury afresh was certainly adopted. At Northampton, in the first case which occurred, Parke, B., expressed his opinion that, under 14 & 15 Vict. c. 19, s. 9, the jury ought to be sworn again, one by one, to try the question whether the prisoner had been previously convicted; and the learned judge himself drew the form of oath as given in the statement of Key's case. The same course was afterwards followed in all other cases during the same circuit.

soner's counsel claimed the right to challenge every one of them ; but I am glad to say that the chairman was firm in resisting that claim ; for we are all of opinion that the challenge was properly disallowed.

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REG. v. SHUTTLEWORTH. (a)

At the Sessions for the borough of Manchester, held before R. B. Armstrong, Q. C., Recorder, on the 4th August, 1851, George Shuttleworth was arraigned on an indictment charging him with larceny, and also with having been previously convicted of felony ; and, according to the invariable practice in that court before that time, both counts were read to the prisoner, and he pleaded not guilty to the whole indictment. At the trial, the count for larceny only was read by the clerk of the peace to the jury, and the witnesses in support of that charge were heard, and the jury found the prisoner guilty. The clerk of the peace then proceeded to read to the jury the further charge, that the prisoner had been previously convicted of felony, when the counsel for the prisoner objected that the charge could not be gone into, and he further stated that it was his intention, however the jury might decide that question, to move in arrest of judgment generally. The court decided that the trial should go on, and the certificate Case. of conviction having been put in, and the identity of the prisoner proved, the jury found that the prisoner had been previously convicted of felony. The prisoner's counsel then moved in arrest of judgment, contending that the plea of the prisoner having been taken contrary to the provisions of the late act (14 & 15 Vict. c. 19, s. 9), was void, and that all the subsequent proceedings were a nullity, and that no judgment could be given on a verdict so found. The court overruled the objection, and sentenced the prisoner to be transported for seven years. The execution of the judgment was respite, and the convict is now in prison. The question for the Court of Criminal Appeal is, whether that sentence, under the circumstances stated, was legal, or whether any judgment could be passed on the verdict so given ?

Milward, for the prosecution, referred to *R. v. Key, supra*.

LORD CAMPBELL, C. J.—There is no doubt upon this point. The new statute, 14 & 15 Vict. c. 19, s. 9, shows what is the proper course of proceeding. Unquestionably the course is to arraign the prisoner, in the first instance, upon the whole indictment ; but, upon his pleading not guilty, to read to the jury only that part which contains the principal charge ; and, unless evidence of character should be given upon the part of the prisoner, after his conviction of that offence to read to the jury, and without reswearing them, to charge them to inquire into the

(a) See *ante*, p. 369.

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second part of the indictment charging the previous conviction. That is the opinion of all the judges.

ALDERSON, B.—This matter has been considered by the judges and we are all, I believe, of opinion that the practice is not substantially altered by the new act.

Convictions affirmed in both cases.

COURT OF CRIMINAL APPEAL.

November 22, 1851.

(Before LORD CAMPBELL, C. J., MAULE, J., PLATT, B.,
TALFOURD, J., and MARTIN, B.)

REG. v. JOHNSON AND WRIGHT. (a)

Larceny—Fraud—Possession or custody.

A. and B., by fraud, induced C. to hand over to B. a cheque for 42l., for the purpose of getting it cashed at a bankers. C., at B.'s request, accompanied him to the bank, and directed the clerk how to cash it; but B. handed the cheque to the clerk, and received from him four 10l. notes and two sovereigns, with which he shortly afterwards made off. A. had remained behind with forty-two sovereigns, which were to be given to C. on his return from the bank; and the jury found that C. did not intend to part with his property in the cheque and change until B. returned from the bank, and he (C.) had received from A. the forty-two sovereigns.

Held, that A. and B. were both guilty of stealing the notes and gold, inasmuch as B. was entrusted with the bare custody of them only, the possession still remaining in C.

AT the General Quarter Sessions of the Peace, held in and for the liberty of Peterborough on the 3rd day of July, 1851, Thomas Johnson and Charles Wright were indicted for stealing a banker's cheque for the payment of 42l.; four bank notes for the payment of 10l. each; and forty-four sovereigns, the property of John Salman: and a verdict of guilty was recorded against them, subject to the opinion of the Court of Criminal Appeal on the following case:—

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

CASE.

The prosecutor was seated at his shop door, at Peterborough, on the 28th of June last, being market day; the prisoners placed themselves near him, and began a conversation about the sale of some beasts and a pony; they disagreed as to the price, Johnson asking 42*l.*, and Wright offering 40*l.*, when the prosecutor said "split the difference;" Johnson then said Wright should have them were it not that his (Johnson's) father would be angry, as Wright had bought two cows over his head; Wright offered to give up the cows; the prosecutor again interposed, and the prisoners appeared to conclude a bargain that Wright should give Johnson 42*l.* for the beasts and pony, and that a half-sovereign should be returned, provided the prosecutor would take the money from Wright and pay it to Johnson, as if he (the prosecutor) was the buyer, and so that Johnson's father might believe him to be the real purchaser. The prosecutor consented to act as a "go-between." The parties then entered his shop, and Wright counted out forty-two sovereigns, forty of which were passed through the prosecutor's hands to Johnson, and the other two laid upon the counter, Johnson laid down the forty sovereigns upon the counter also, with the explanation that his father, "who was an austere man," would not be satisfied without a cheque upon a banker, and requested the prosecutor to draw one accordingly. The prosecutor went round to his desk, leaving the prisoners with the sovereigns, drew the cheque payable to Thomas Johnson, or bearer, for 42*l.*, returned and delivered it to Johnson. At this time he lost all thought of the money, and when he returned from his desk the sovereigns had disappeared. Johnson said the prosecutor must go with him to the bank to draw the money. The prosecutor consented, and Wright was to remain in the shop until they returned "to finish the transaction." The prosecutor and Johnson left Wright alone at the shop-door and went to the bank together, when the cheque was cashed, by desire of the prosecutor, in four notes of 10*l.* each and two sovereigns. Johnson took the money and came out of the bank, the prosecutor stopping for a minute or two to give some directions about his pass-book. Instead of returning at once to Wright (at the prosecutor's shop), Johnson requested the prosecutor to accompany him to an inn, where he said his father was to satisfy him as to the business. They went into the inn-yard together, where Johnson called for his pony, at the same time slipping a half-sovereign into the prosecutor's hand, saying, "I will go and turn out the beasts," when he made off by the back entrance of the inn-yard, leaving the prosecutor with the half-sovereign and the pony, which the ostler delivered to him instead of returning with him to the shop (where Wright was to remain) to finish the transaction, as the prosecutor all along expected was to be done, and the forty-two sovereigns handed over to him. The prosecutor then, for the first time, suspected he had been cheated. He made haste home with the pony, and found that Wright had fled and the forty-two sovereigns also, nobody

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but prosecutor's daughter having been in the shop. The pony, with the bridle and saddle, were not worth more than fifty shillings. The prisoner, Johnson, was well dressed, like a farmer, and Wright like a jobber; and the prosecutor swore that he believed them to be respectable men, and engaged in a *bonâ fide* transaction, and that he assisted in it purely out of good nature, and was not to receive one penny for what he did. He also stated that he should have allowed Johnson to go to the bank alone with the cheque, he remaining with Wright and the sovereigns in the shop, had not Johnson requested him to go to the bank with him. The prosecutor expressly stated in his evidence that he expected Johnson was to come back with him to Wright, and that he was to have the forty-two sovereigns from Wright. That he did not expect Wright would "cut away," and did not consider Johnson at liberty to go off with the money before he (the prosecutor) had the sovereigns in exchange. It was proved that, during the same morning, the prisoners attempted to engage another party in a similar transaction, and evidence was given to show that the prisoners were acting in concert, and were apprehended in a gig together the same evening, about twenty miles from Peterborough, Wright having forty-five sovereigns upon him.

The prisoners' counsel contended that these facts would not justify a conviction for larceny. The chairman, therefore, put the following questions to the jury:

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1st. Did the prisoners throughout intend to get the property of the prosecutor into their possession by fraud and apply it to their own use?

2nd. Did the prosecutor intend to part with his property in the cheque and change until Johnson returned with them, and the prosecutor received the forty-two sovereigns.

3rd. If they should find that when the prosecutor gave Johnson the cheque he parted with the property in it, and the money obtained for it at the bank, whose property was the forty-two sovereigns left upon the counter?

And he directed that if they found the first question in the affirmative, and the second in the negative, that the prisoners were in law guilty of larceny of the cheque and change; and further, that if they found the first two questions in the affirmative, and found also that the forty-two sovereigns left on the counter became the property of the prosecutor when the cheque was delivered to Johnson or cashed at the bank, and were taken away by Wright, they were guilty of a larceny of those forty-two sovereigns. The jury found an original intent to defraud, followed by a general verdict of guilty, when the prisoner's counsel applied for a case for the opinion of the Court of Criminal Appeal, and thereupon the chairman requested the jury to give distinct answers to the several questions before stated, and they answered the first question in the affirmative, and the second in the negative, and no reply to the third question was thereupon asked for. If, upon the facts stated and findings by the jury, the prisoners are guilty of larceny, the

verdict is to stand. The prisoners were liberated upon giving bail to appear and receive judgment.

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Bliss, for the prisoners.—1st. There is no question reserved as to the forty-two sovereigns left in the possession of Wright, and, in fact, they never were the prosecutor's. They were the money of Wright handed to the prosecutor to pay over to Johnson. [LORD CAMPBELL, C. J.—At all events they are not convicted of stealing the sovereigns.] 2ndly, then there was no larceny either of the cheque or the proceeds of the cheque. The cheque was always used precisely as the prosecutor wished; and further, the prosecutor parted with the property therein to the prisoner Johnson. Then, as to the notes and gold, they never were the prosecutor's at all. They belonged to the banker until they were paid to Johnson in the ordinary course of business, as the person who presented the cheque. If a prosecutor is induced by fraud to part with the possession of money or goods, it is larceny; but if he parts with the property, the offence is obtaining money by false pretences. [LORD CAMPBELL, C. J.—May not the possession of the prisoner be constructively that of the prosecutor? They jointly present the cheque.] Yes; but the notes never reached the hands of the prosecutor, and the possession of the prisoner could not be the possession of the prosecutor, unless the notes had antecedently reached the hands of the prosecutor. The receipt by the prisoner, assuming it to be on account of the prosecutor, might under some circumstances be embezzlement, but could not be larceny. In *Bazeley's case* (2 Leach, 835; 2 East, P. C. 571) a banker's clerk was indicted for stealing a bank-note paid to him over the counter. He was authorized to receive notes and money at the counter, but instead of putting the note in question into the proper drawer, he converted it to his own use. Yet he was held not guilty of larceny, the judges, after much consideration, agreeing that it was not felony, inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner, but that it would have been otherwise if the prisoner had deposited it in the drawer and had taken it afterwards. So in *Waite's case* (1 Leach, 28; 2 East, P. C. 570), a cashier of the Bank of England, to whom East India bonds were delivered, was held not guilty of larceny in selling them for his own use before they had been deposited in their proper place; and *Bull's case* (2 Leach, 841; 2 East, P. C. 572) proceeded upon the same principle. The prisoner had received money from his master's customer, but, as he had not put it into the till, it had never been in the possession of the master as against the prisoner, and the prisoner's conversion of it was not felony. It was in consequence of these decisions that the statute of embezzlement was passed, and they show that, even in the case of master and servant, the possession of the servant is not that of the master, unless the property has first come into the

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master's hands, or been deposited in its proper place for the master, or, according to *R. v. Watts* (4 Cox Crim. Cas. 336), has reached its final destination. In *R. v. Watts* the clerk of an insurance company was convicted of stealing a cheque. The cheque was one which had been paid by the company's bankers and returned, and it being part of the prisoner's duty to receive and preserve the paid cheques for the use of the company, he had received the cheque in question and abstracted it. He was held guilty of larceny, because the cheque had reached its ultimate destination when it came into his keeping, and as that keeping was for the company, the prisoner's possession was their possession.

Mellor, in support of the conviction.—The original fraud affected the whole transaction, and the prosecutor, therefore, in law never parted either with the property or the possession of the cheque. [LORD CAMPBELL, C. J.—The cheque was used precisely as he intended.] But that intention was procured by fraud, and the taking of it, therefore, was *invito domino*. [MAULE, J.—Would not that do away with the distinction between larceny and false pretences?] The offence certainly is that of obtaining money by false pretences, where the prosecutor intends absolutely to part with the property; but if he is induced by fraud to give up possession only, then the offence is larceny. In the present case it is submitted, first, that the larceny was complete when the cheque was obtained by fraud with intent to appropriate it; but, secondly, that, at all events, when the notes and gold were delivered over to Johnson by the banker, they were sufficiently in the possession of the prosecutor to make the subsequent appropriation of them larceny. In 2 Russ. on Crimes (p. 23), it is said, "It has been suggested as worthy of consideration whether the distinction concerning the legal possession remaining in the owner after a delivery in fact to another, does not extend to all cases where the thing so delivered for a special purpose is intended to remain in the presence of the owner. And it is well advanced in support of the observation that in cases of this kind the owner cannot be said to give any credit to or repose confidence in the party in whose hands it is so in fact placed, and that the thing being intended to be returned to the owner again, and resumable by him at any moment, his dominion over it is as perfect as before; and the person to whom it is so delivered has, at most, no more than a bare limited use or charge, and not the legal possession of it: (2 East, P. C. 683.) And, though the case of a person going into a shop, under a pretence of buying goods, and upon their being delivered to him to look at, running away with them; and also that of a person going to a market, and obtaining a horse for the purpose of trying its paces, and then riding away with it, have been considered as felonies, on the ground of a preconcerted design to steal the chattels (1 Hawk. P. C. c. 33, ss. 14, 15; Kel. 82; 2 East, P. C. 677), yet they appear also to be sustainable on the ground that the legal possession of such chattels still remained in the owner of the goods, notwithstanding the delivery, *he continuing*

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present:" (*Chisser's case*, T. Raym. 275, 276; 2 East, P. C. 683, 684.) Here the prisoner had the bare custody; they were just as much in the possession of the prosecutor as if they had been handed to him. The prisoner never had any independent possession of them, for it was the prosecutor who, at the banker's, claimed the right over them, and directed how they should be cashed. The cases cited are inapplicable; they are cases in which money was lawfully received by servants for their masters; and it was held that the masters had no possession as against the servants,—no independent possession. *Spear's case* (2 Leach, 825; 2 East, P. C. 568) and *Abraham's* (2 Leach, 824; 2 East, P. C. 569), are two cases in which the possession of the servant was held to be that of the master. In the former, a cornfactor, having purchased a cargo of oats on board a ship, sent his servant with his barge to receive part of the oats in loose bulk; and the servant ordered some to be put into sacks, which he afterwards converted to his own use. It was held larceny, and a taking from the actual possession of the owner "as much as if the oats had been in his granary." In the present case, according to the arrangement between the prosecutor and the prisoner, the latter was to have the custody only of the notes until they returned to the shop, where the transaction was to be completed. In *R. v. Walsh* (4 Taunt. 258; 2 Leach, 1054; 1 Russ. & Ry. 215) the authorities on this subject were much considered; but the case itself is not in point.

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Bliss, in reply.—If the prosecutor parted with the property in the cheque, the fraud makes no difference. The distinction appears clearly from the two cases of *R. v. Robson* (Russ & Ry. 413), and *R. v. Nicholson* (2 Leach, 610; 2 East, P. C. 669.) In the former, the prosecutor was drawn in to deposit in the hands of one of the prisoners twenty guinea notes on a pretended bet, and the jury having found that there was a plan between the prisoners to keep the deposited notes, the judges held the prisoners properly convicted of larceny, because, at the time of the taking, the prosecutor parted with the possession only; but in the latter, where also the prosecutor was inveigled into betting with sharpers, who allowed him to win at first, the contrary conclusion was arrived at, because not the possession only, but the property in the money, was parted with by the prosecutor, under the idea that it had been fairly won. [TALFOURD, J.—In this case the finding of the jury is against you.] As to the cheque, the finding is repugnant to the facts stated. [MAULE, J.—Why may they not have agreed that the cheque should continue to be the prosecutor's, until the forty-two sovereigns were paid over to him? If so, then the delivery was conditional only; and suppose that the prisoner took it with the intention of converting it absolutely to his own use, without performing the condition, would not that be larceny?] The facts will not bear out that supposition. Then, as to the notes, the question is, whether the prosecutor had any possession inde-

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pendent of the prisoner—not whether the prisoner had any possession independent of the prosecutor. [LORD CAMPBELL, C. J.—Can it make any difference whether the prosecutor receives the notes, and hands them over to the prisoner, or whether the notes are handed to the prisoner in the presence of the prosecutor?] It was never intended that the prosecutor should have the notes at all. [MAULE, J.—The jury have so found.] They have found the intent of the prosecutor; but that will not determine the question. The court is to look at the facts stated in the case, as they would look at a special verdict: (*R. v. Tilley*, 2 Leach, 662.) [MAULE, J.—The judges formerly exercised a very different jurisdiction in these matters, from that which belongs to this court.] If, however, the court can see that, in point of law, the property had passed, that is sufficient to reverse this conviction. In *R. v. Spears*, the decision went upon the ground that the prosecutor had an independent possession; and in *R. v. Walsh*, the general doctrine, that the fraud or contrivance of the prisoner is immaterial upon the question as to the transfer of property is upheld. *Cur. adv. vult.*

Judgment.

LORD CAMPBELL, C. J., now delivered the judgment of the court.—We are of opinion that the conviction is right as to the bank notes, and two sovereigns given in exchange for the cheque. It appears that the cheque was the property of the prosecutor, and the jury found that the prisoners, throughout, intended to get the property of the prosecutor into their possession by fraud, and to apply it to their own use; and that the prosecutor did not intend to part with his property in the cheque and change till Johnson returned to his shop, and he received the forty-two sovereigns. The cheque then being the property of the prosecutor, he accompanied Johnson to the banker's, where it was to be cashed; and then it is expressly found in the case, that the two being together at the banker's, the cheque was cashed *by the desire of the prosecutor*, in four 10*l.* notes and two sovereigns. These words in the case are extremely material, because they show that the prosecutor continued to exercise control over the transaction, as proprietor of the cheque; and it was upon his direction that the banker paid the four notes and two sovereigns. These were handed over to Johnson; and we must take it that they were so handed over with the permission and by the order of the prosecutor, and that Johnson was entrusted to hold them, and merely to hold them for the prosecutor. He had the custody only, and not the possession, which remained in the prosecutor. Both the property and the possession remained in the prosecutor, and Johnson received them with the intention to steal; and he afterwards actually did steal them, for he took them *invito domino*. The authorities in 2 East, P. C., are expressly in point, and the conviction must be affirmed.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

November 22, 1851.

(Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B.,
TALFOURD, J., and MARTIN, B.)

REG. v. VANN. (a)

Nuisance—Neglect of parent to bury his child—Ability—Offer by guardians of money by way of loan.

Upon an indictment for nuisance, charging the defendant with refusing and neglecting to bury the body of his child, it was proved that the defendant was a pauper, but that the guardians, acting under the orders of the Poor Law Board, had offered him money for the purpose of enabling him to bury his child, upon his signing an undertaking to repay it on demand.

Held, that he was not bound to accept that offer; and could not be convicted of a nuisance.

THE defendant was tried before J. Hildyard, Esq., Recorder of Leicester, at the Michaelmas Sessions for the borough, for a nuisance in having refused and neglected to bury the body of his deceased child, whereby and by reason of the decomposition thereof, various noisome stenchs arose, and the air was thereby greatly infected and rendered unwholesome, to the great damage and common nuisance of the Queen's subjects. The defendant, at the time of the decease of his child, on the 17th of August, was a pauper, who had been receiving relief from the parish of St. Margaret, in the Leicester Union, and, soon after the child's death, he applied to the relieving officer of that parish for assistance to bury the child. It appeared in evidence that the order of the Poor Law Commissioners, under the provisions of the statute of the 4 & 5 Will. 4, c. 76, s. 58, had been issued to the guardians of the Leicester Union, which provided that, in certain cases, relief might, if the guardians thought fit, be given by way of loan, and that one of such cases was, "where the pauper should receive relief for the purpose of defraying the expenses, either wholly or in part, of the burial of any of his family." It further appeared in evidence that the guardians had laid down a rule (which was printed and circulated in the union), "That the head of the family or person applying for the assistance of the parish in burying any poor person, must sign an under-

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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taking to repay the expenses incurred, in case the guardians shall deem him or her able to do so." It further appeared that, at the time the defendant applied to the relieving officer for assistance to bury his child, he was required, in conformity to the rule laid down by the guardians, to sign a document to the following effect:—"I, W. V., the undersigned, do hereby agree on demand to repay the guardians of the poor of the Leicester Union the sum of 7s., advanced to me by way of loan, in payment for coffin and ground for my child." The defendant refused to sign this document, and the relieving officer refused to render him any assistance in the burial of the child. It was proved that the defendant removed the body of the child from his house to a yard in the neighbourhood, and that the stench arising from it amounted to a nuisance. The jury were directed that the defendant was bound to provide for the burial of his deceased child, if he could in any lawful way procure the means of so doing; and that as the guardians were entitled, under the order of the Poor Law Commissioners, to give relief for the purposes of burial by way of loan, and as the defendant had been offered such relief in that manner, he was bound to receive it, and that, consequently, he was not excused from his liability to provide for the interment of his deceased child, and was liable to be convicted on the indictment for nuisance. The jury found a verdict of guilty, and the Recorder reserved a case for the consideration of this court.

Argument.

O'Brien, for the prosecution.—[PLATT, B.—What public duty is there to incur a debt?] The public duty was to provide for the burial of the child. [LORD CAMPBELL, C. J.—If the defendant had the means.] Certainly; but he had the means when the guardians offered him the money. [LORD CAMPBELL, C. J.—Would he be bound to accept the offer of a Jew to lend him money at 50 per cent. interest?] No; the means must be legal and reasonable. [ALDERSON, B.—You would have had a better case against the guardians.] The duty of providing burial is as imperative as that of providing sustenance, and if bread was offered upon reasonable terms to the parent of starving children, and he refused it, would he not be responsible for their death? By incurring a debt he only makes himself poorer, and if another person in his absence had buried the child for him, he would have incurred a debt to that person: (*Ambrose v. Kerrison*, 20 L. J. 135, C. P.) (b) [LORD CAMPBELL, C. J.—Then has he committed a crime, though he has no means of doing the act? According to that argument, if he had not a farthing he would be bound to do it, and indictable for not doing it. He certainly was not bound to steal for the purpose—was he bound to beg, or to borrow? TALFOURD, J.—

(b) The marginal note of that case is as follows: "When a wife dies, her husband is bound to provide her with a funeral at a reasonable expense; and if he does not do so, any person who voluntarily employs an undertaker, and pays him for performing such a funeral, is entitled to recover the sum so expended from the husband in an action for money paid."

The loan is only offered on the terms that it should be payable on demand. MARTIN, B., referred to a case tried at Gloucester, where a woman was convicted of the manslaughter of her child, she having neglected to apply to the relieving officer for relief, and the reason which she gave for that neglect being that she was afraid the parish officers would take proceedings against her husband to compel him to maintain her and her child.] The question is certainly one of ability to do the act, but he had the ability when the means of doing it were placed in his hands upon reasonable terms, and the terms here offered were those sanctioned by the Poor Law Board. [LORD CAMPBELL, C. J.—The jury were told that there was conclusive evidence of ability. The question was not left to them.] If the condition imposed was lawful, and one which he ought to have accepted, then he had the means.

No counsel appeared for the prisoner.

LORD CAMPBELL, C. J.—Upon the question left to us, I think Judgment. the conviction wrong. The direction of the Recorder cannot be supported. He told the jury that the defendant was bound to provide for the burial of his deceased child if he could in any lawful way procure the means of so doing, and so far he was right; but then he adds, “and that as the guardians were entitled under the order of the Poor Law Commissioners to give relief for the purposes of burial by way of loan, and as the defendant had been offered such relief in that manner, he was bound to receive it; and that, consequently, he was not excused from his liability to provide for the interment of his deceased child, and was liable to be convicted upon the indictment for nuisance if the jury believed the facts.” That he lays down in point of law. Now there is no doubt that if a parent has the means of giving his child christian burial, he is bound to do so, but he is not to be indicted for a misdemeanor if he has not the means, although the body of the child may occasion a nuisance, for which the parish officers would probably be liable; but we think the recorder was wrong in telling the jury that the defendant was bound to accept the offer made by the guardians of a loan payable on demand, and that if he refused, he might be proceeded against criminally for a nuisance. We think that in point of law he was under no such obligation. The jury ought to have been asked the question whether the defendant was of ability to bury his child, and ought not to have been told as a maxim of law that he rendered himself liable to be convicted of a nuisance by refusing the offer of the guardians.

Conviction reversed.

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COURT OF CRIMINAL APPEAL.

November 22, 1851.

(Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B.,
TALFOURD, J., and MARTIN, B.)

REG. v. WORTLEY. (a)

*Embezzlement—Contract for service—Labourer—Stamp Act—
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A. contracted with B. to manage a farm for him as bailiff, receiving a yearly salary and a certain share of the clear profits after all expenses paid. He was instructed to account, and did account, at stated periods; but on one occasion denied the receipt of two sums of money, which had been paid to him in the course of the business of the farm:

Held, that A. was guilty of embezzlement, the relation of master and servant being created by the contract; and that the contract was admissible in evidence without a stamp, being a contract for the hire of "a labourer" within the exemption in the Stamp Act.

THE prisoner, Samuel Amos Wortley, was tried at the Quarter Sessions for the county of Somerset, held at Taunton, on the 14th day of October, 1851, on an indictment which charged that he, being a servant to the Rev. Jos. Butterworth Bulmer Clarke, on the 2nd day of September, in the year of our Lord 1851, and on the 1st day of October, in the year of our Lord 1851, did feloniously embezzle two sums of money, one of 28*l.* 12*s.* and the other of 18*l.* 10*s.* the property of his said master. It appeared at the trial that the prisoner, on the 12th of March, 1850, entered into the following agreement with the prosecutor, which, being duly proved, was tendered in evidence. It was unstamped:—

"Samuel Wortley engages to take charge of the glebe land of the Rev. J. B. Clarke, his wife undertaking the dairy and poultry, &c. at 1*s.* a week till Michaelmas 1850, and afterwards at a salary of 25*l.* a year, and a third of the clear annual profits, after all expenses of rent, rate, labour, and interest on capital, &c. are paid, on a fair valuation, made from Michaelmas to Michaelmas. Three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by Samuel Wortley, who occupies it as bailiff in addition to his salary.—March 12, 1850.

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"S. A. WORTLEY."

(a) Reported by A. BITTLESTON, Esq., Barrister-at Law.

The prisoner's counsel objected to its reception in evidence, on the ground that it required a stamp, either as a contract for a partnership or as an agreement, not within the exemption in the Stamp Act.

The objection was overruled, and the document admitted in evidence. It was proved that the prosecutor was the owner of a farm consisting of certain glebe lands, and that on the 12th of March, 1850, the prisoner entered into the management of them on the terms of the said agreement, and that he continued to manage them on the same terms up to the 4th of October, 1851, when he absconded. He had been instructed to account for all sums received, and did so account, at certain stated periods, with the wife of the prosecutor, except as hereinafter mentioned. The stock, crops, &c., on the farm were purchased with the money of the prosecutor, the prisoner not contributing to the capital employed in carrying on the business. In the course of the business, on the days specified in the indictment, he received the two several sums in the indictment mentioned for a portion of a quantity of wheat which the prisoner had purchased by public auction in the course of his management of the business in a growing state, and afterwards cut and thrashed, and which standing wheat, so purchased by the prisoner, was paid for by a bill of exchange drawn by the auctioneer upon, and accepted by the son of the prosecutor on the prosecutor's behalf. And the prisoner having, on his accounting subsequently with the prosecutor, denied the receipt of such two sums, applied them to his own use. At the close of the case, it was objected that the prisoner did not stand in the relation of servant, but of partner, to the prosecutor; and, at all events, that the prosecutor had no right to call on the prisoner to account till Michaelmas, 1851, when the respective shares, rights, and interests of the prosecutor and prisoner in the profits and property were to be ascertained, and that, therefore, the indictment failed. The court overruled the objections, directing the jury that the agreement created the relation of master and servant between the prisoner and the prosecutor, and not that of partner, and that the prisoner's denial of the receipt, although there had been no valuation of the property or the profits ascertained, was sufficient to constitute the offence charged.

The jury convicted the prisoner.

The COURT respited the judgment, and remanded the prisoner to the next sessions, reserving for the opinion of the justices of the Bench and of the Barons of the Exchequer the two following questions:—

1st. Whether the agreement was properly received in evidence without a stamp?

2nd. Whether the direction to the jury that the agreement created the relation of master and servant, and not that of partner, was correct: and whether the denial of the receipt by the prisoner, under the circumstances, constituted the crime of embezzlement, as charged in the indictment?

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No counsel appeared for the prisoner.

Phinn for the prosecution.—The question is whether this instrument was admissible without a stamp; and it might be questioned whether, in a case between the Crown and the prisoner, the Stamp Acts would bind the Crown. [LORD CAMPBELL, C. J.—That point may be worthy of some consideration; but according to the cases collected in Roscoe on Criminal Evidence, p. 211, it seems to have been decided that though a forged instrument which is not stamped may be received in evidence, an instrument offered for any purpose of giving it validity is not admissible unless it be duly stamped according to the Stamp Laws. (c)] *R. v. Gillson* (Russ. & Ry. 138) (d) is the leading authority; but it is not necessary to enter upon that question, because it is submitted that this instrument was within the exemption of the Stamp Act, 55 Geo. 3, c. 184, Sched. "Agreement," as "a memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant."

(c) See *Reg. v. Gompertz*, 9 Q. B. 824; 2 Cox C. C. 145; where Lord Denman, ingiving the judgment of the court, said:—The reception, in evidence, of a warrant of attorney, without a stamp, was another ground of application for a new trial. This is a point of very great importance, for few frauds are committed without the intervention of written instruments made subject to the stamp duties; and yet, on such occasions, they are rarely stamped. The giving such an instrument as a security, on the face of it valid to an ignorant person's apprehension, but really unavailable for want of a stamp, may, sometimes, be one of the means by which the fraud is practised; and where the object of the evidence is not to enforce or set up the instrument as a valid instrument, but merely to show that it was part of a scheme of fraud, and so to use it for a purpose collateral to the subject apparent upon the face of it, there are many cases in which it has been held that a written instrument requiring a stamp, but unstamped, is admissible. On the other hand, if there be any allegation to the proof of which an instrument available in law is necessary, or if it be tendered as such instrument, unless, as in forgery, it be itself the subject-matter of the charge, then it cannot be received unstamped, if of a nature requiring a stamp. This distinction is well known, and it is needless to cite the cases which establish it. In the present case, the fraud on the witness Rose was only the more complete by the instrument given to him as a security being unstamped. As proof of the principal charge it was immaterial whether stamped or not; in effect it was tendered, not to prove that the defendant Gompertz gave the witness a warrant of attorney, for which purpose it would have been inadmissible, but to confirm the witness's general story by producing a paper signed by the defendant, which, whether valid or not, the witness alleged the defendant to have given to him as a good counter-security. In this point of view, the validity of the instrument was wholly immaterial. On principle, therefore, the instrument was receivable. And this case is not identical with the case of *Re v. Hall* (2 Star. N. P. C. 67), where a receipt was put in distinctly as such to prove the receipt of the money, the very purpose for which the Legislature had made it inadmissible without a stamp. In the case of *R. v. Welch*, tried at the last Warwick Assizes before my brother Coleridge, to prove the party charged with embezzlement, a clerk, an unstamped appointment of him as such, with a salary of 200*l.* per annum, was offered and rejected, because the relation of master and clerk was the foundation of the proceeding, and the law expressly provides that that relation shall not be proved to have been created by a written but unstamped agreement, and that such agreement without stamp should be void and not available to any purpose. The relation, therefore, of master and servant did not exist by reason of the want of a stamp. And we are of opinion that this warrant of attorney was admissible in the present case on both these grounds.

(d) S. C., 2 Leach, 1007, 1 Taunt. 95. That was an indictment for feloniously setting fire to a house with intent to defraud an insurance company; and upon the trial a policy of insurance was given in evidence, whereby the prisoner's goods in a house therein described were insured against fire. Upon the policy was indorsed a memorandum, stating the removal of the goods to another house therein described; and in which the felony was alleged to have been committed. The policy was properly stamped; but not the memorandum; and on a case reserved, six judges to five held the conviction wrong, because the memorandum being unstamped, had been improperly received in evidence.

The two questions submitted to the court cannot be kept distinct, because the admissibility of the instrument depends upon the proper construction of it. First, then, it creates a contract of service and not a contract of partnership. The stipulation that the prisoner should have one third of the annual profits did not make him a partner; it is only a mode of payment for his services: (*Mair v. Glennie*, 4 M. & S. 240.) So in *R. v. Hartley* (Russ. & Ry. 139), it was held that a person employed as captain of one of the prosecutor's coal barges to carry out and sell coals, whose duty was to bring back the money for which the coals were sold, was a servant within the Statute of Embezzlement, although he was entitled to two-thirds of the difference between the money which he received and the value of the coals at the colliery and the duties. Other cases on the subject are collected in Story on Partnership, pp. 22, 74. [LORD CAMPBELL, C. J.—It is decided no doubt in many cases that the repayment of labour by a percentage upon the clear profits does not constitute partnership. ALDERSON. B.—There is no responsibility for losses.] The servant who is paid in this manner might be said perhaps to participate in the losses, because, if no profits are made, then his percentage is not earned; but still if it is a mere mode of payment they are not partners *inter se*; and that is the question, whether they are partners *inter se*. *Dry v. Boswell* (1 Camp. 329) has been doubted; but it is quite distinguishable from the present case, because there the question was, whether there was a partnership *quoad* third parties. Then, secondly, assuming this to be a contract for service, it is a contract for the hire either of a menial servant or a labourer. Lord Coke describes a menial servant as one who lives *intra mœnia*; but the definition was carried much further in *Nowlan v. Ablett* (2 Cr. M. & R. 54) where the plaintiff, who was a head gardener, at a salary of 100*l.*, and had the superintendence of hothouses, a separate house to live in, and the privilege of taking apprentices, was nevertheless held a menial servant, and only entitled to a month's warning. *Wilson v. Zulueta* (19 L. J. 49, Q. B.), is the last case upon this exemption; and there the stoker on board a steam vessel was held to be a labourer or artificer. [LORD CAMPBELL, C. J.—Why may not this prisoner be considered a labourer?] He may be so considered; but there is also a case of *Johnson v. Blenkinsopp*, 5 Jur. 870, where a man was held a menial servant who was to keep gardens and pleasure grounds in clean and good order, to assist in the stables, and, when required, to assist at hay and corn harvest, and to make himself generally useful, for which services he was to have six shillings a week, three bolls of wheat, to set potatoes for his family's use, to have a cow kept, and to have house and firing. [LORD CAMPBELL, C. J.—There, also, the question was as to a month's notice; but here it is whether he is a menial servant within the Stamp Act. It may, perhaps, be desirable to introduce into some Criminal Amendment Act a provision that the Stamp Acts should not apply to criminal cases.] Lastly, it is unnecessary

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to argue that the denial of the receipt of the money was evidence of embezzlement.

LORD CAMPBELL, C. J.—I am of opinion that this conviction ought to be sustained. Assuming that, if this had been an agreement for a partnership, it could not have been received in evidence without a stamp, I think that it is not such an agreement, but an agreement for the hiring of a labourer within the meaning of the exemption in the Stamp Act. There is no reason for confining that exemption to a person who has no labourers under him, to the mere hedger and ditcher; it may well apply, also, to a person who labours himself and also superintends the labour of others. I think, therefore, that even in a civil action this agreement would have been admissible. Then upon the second question, whether the direction of the chairman that this instrument created the relation of master and servant was correct, I am of opinion that it was. It did not create a general partnership between them; they were not partners *inter se*, although the prisoner was to receive a share of the clear profits by way of compensation for his labour. As to the remaining question, whether the denial of the receipt of the two sums constituted evidence of an embezzlement, there is an abundance of cases to show that it does.

ALDERSON, B.—I think the prisoner was not a menial servant; but as amongst menial servants there is no distinction of degrees, why should we introduce any distinction between different classes of labourers?

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

(Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B.,
TALFOURD, J., and MARTIN, B.)

November 22, 1851.

REG. v. SHRIMPTON. (a)

Practice—Previous conviction in reply to evidence of character.

Upon the trial of a prisoner for larceny, one of the witnesses for the prosecution, in answer to questions by the prisoner's counsel, stated that he had known the prisoner six or seven years, and that he had borne a good character for honesty. Thereupon the prosecution proved that the prisoner had been convicted of larceny ten years before. Held, that the previous conviction was admissible under 6 & 7 Will. 4, c. 111, and 14 & 15 Vict. c. 19.

THIS was a case reserved by the Worcestershire Sessions. At the General Quarter Sessions of the Peace for the county of Worcester, held on the 13th day of October, 1851, James Shrimpton was indicted for felony. The indictment contained a statement of the previous conviction of the prisoner for felony in the year 1838. In the course of the trial, John Roberts was examined as a witness for the prosecution. On cross-examination by the counsel for the prisoner, John Roberts stated that he had known the prisoner for six or seven years last past, and that during that time the prisoner had borne a good character for honesty. The counsel for the prosecution thereupon claimed, under the provisions of the statute 14 & 15 Vict. c. 19, s. 9, to give evidence of the previous conviction of the prisoner in 1838, as mentioned in the indictment. This evidence was objected to by the prisoner's counsel as inadmissible, first, because the evidence of the good character of the prisoner elicited from the witness Roberts was confined to the period between the years 1844 and 1851, and therefore evidence of the prisoner's conviction in 1838 was not in answer thereto; secondly, because Roberts, being a witness for the prosecution only, the prisoner did not, by the answers of Roberts to questions put to him in cross-examination, give evidence of his (the prisoner's) good character within the meaning of the 14 & 15 Vict. c. 19, s. 9; the Court overruled the objection, and the conviction of the prisoner in 1838 was thereupon given in evidence before the verdict was returned. The prisoner was found

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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guilty, and sentenced to nine months' imprisonment, but the Court of Quarter Sessions reserved for the opinion of Her Majesty's judges the question of law whether, under the circumstances above stated, proof of the said previous conviction of the prisoner was properly received in evidence before the verdict of guilty was returned.

Argument.

Selfe, for the prisoner.—This depends upon the statute 6 & 7 Will. 4, c. 111, the words of which are the same as those used in 14 & 15 Vict. c. 19. They were passed to remedy the practice, which had obtained under 7 & 8 Geo. 4, c. 28, of treating the previous conviction as part of the offence charged, which was supposed to operate unfairly, to the prejudice of the prisoner; and the court will so construe them as to give full effect to the intended remedy. In the present case, the prisoner has not "given evidence" of his good character, which means calling witnesses on his part, and not merely asking questions of the witnesses for the Crown. The language of the statute is not satisfied, unless such evidence is given as would entitle the Crown to a reply. The resolutions of the judges, under the Prisoners' Counsel Act, speak of the deposition being read as part of the evidence of the cross-examining counsel, and entitling the counsel for the prosecution to reply. Baron Parke, in *R. v. Gadbury* (8 Car. & P. 676), certainly appears to have expressed an opinion the other way; but the point was not decided in that case. Suppose a witness, under cross-examination, should of his own accord give evidence as to the prisoner's good character, would that let in the previous conviction. [LORD CAMPBELL, C. J.—That would be a very different question. I think, at present, that in that case I should not admit the conviction.] Secondly, even if evidence of character was given by the prisoner at all, within the meaning of the statute, this conviction was not "in answer thereto." It referred to a different time. [ALDERSON, B.—You say he is not likely to have committed this offence, because he is a man of good character; then, in answer to that, they say he is likely, because he is not a man of good character.] It is not every sort of evidence as to character which would be relevant. It would be no answer to a good character for honesty, to show that he was an immoral man, that he had been convicted of a rape or a violent assault.

LORD CAMPBELL, C. J.—At all events, a conviction for theft is surely in answer thereto.

No counsel appeared for the Crown.

Judgment.

LORD CAMPBELL, C. J.—We are all agreed that this conviction is right. The statement in the case is, that John Roberts was examined as a witness for the prosecution; that on cross-examination by the counsel for the prisoner, he stated that he had known the prisoner six or seven years last past, and that during that time the prisoner had borne a good character for honesty. The words of the Legislature are, "that if, upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the

prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions, at the same time that they inquire concerning such subsequent offence." The object of the Legislature was, to defeat the scandalous attempt often made by persons, who had been repeatedly convicted of felony, bringing witnesses, or cross-examining the witnesses for the prosecution, to prove that the prisoner had previously borne a good character for honesty. The mischief is as great, whether such evidence be elicited from the witnesses for the prosecution, or from those who are called on the part of the prisoner. Indeed greater; for the jury are more likely to be deceived by evidence in favour of the prisoner which falls from the witnesses for the Crown. The enactment would have been defective, if it had allowed evidence of good character to be given, and not the evidence of bad character also. The question then is, did the prisoner in this case give evidence of good character, so as to render it lawful for the prosecutor to offer the previous conviction in evidence? It seems to me, that the natural and necessary interpretation to be put upon the words of the statute is, that if, either by calling witnesses on his part, or by cross-examination of the witnesses for the Crown, the prisoner relies upon his good character, it is lawful for the prosecutor to give the previous conviction in evidence.

ALDERSON, B.—The words of the statute are "give evidence,"—not "call witnesses,"—and the two certainly are not equivalent.

The other judges concurred.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

(Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B.,
TALFOURD, J., and MARTIN, B.)

November 22, 1851.

REG. v. PRESTON. (a)

Larceny—Lost goods—Taking.

Upon the trial of an indictment for stealing a bank note which had been lost in a public street, but had the name of the owner thereon, the judge told the jury, that if the prisoner knew the owner, or had reasonable ground for believing that he could be found at the time when he first resolved to appropriate the note to his own use, he was guilty of larceny; but if, at that time, he had not that knowledge or belief, he was not guilty.

Held, a misdirection; because, if the prisoner, when he first took possession of the note, so as to know what it was, meant to act honestly with regard to it, no subsequent alteration of that intention, and conversion of the note to his own use, could render him guilty of larceny.

THE following case was reserved by the Recorder of Birmingham:—

Michael Preston was tried before me, at the last Michaelmas sessions for the borough of Birmingham, upon an indictment which charged him in the 1st count with stealing, and in the 2nd count with feloniously receiving, a 50*l.* note of the Bank of England. It was proved that the prosecutor, Mr. Collis, of Birmingham, received the note in question, with others, on Saturday, the 18th of October, from a Mr. Ledsam, who, before he handed it to the prosecutor, wrote on the back of it the words, "Mrs. Collis." It was further proved, that Collis was a very unusual surname in Birmingham, and almost, if not quite confined to the family of the prosecutor, a well known master manufacturer. About four or five o'clock the same afternoon, the prosecutor accidentally dropped the notes in one of the public streets of Birmingham, and immediately gave information of his loss to the police, and also caused hand-bills, offering a reward for their recovery, to be printed and circulated about the town. On Monday the 20th, about three o'clock in the afternoon, the prisoner, who had been living in Birmingham fourteen years, and keeping a shop there, went to one of the police stations, and inquired of a policeman if there was not a reward publicly offered for some notes that had been lost, and whether their numbers were known, stating that

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(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

he was as likely as any person to have them offered to him, and if he heard anything of them, he would let the police know. He also inquired if the policeman could give him a description of the person who was supposed to have found them, and the policeman gave him a written description of such person, who was described therein as a tall man. Afterwards, between three and four o'clock on the same afternoon, the prisoner went to the shop of Mr. Nickley, in Birmingham, and, after inquiring if he (Nickley) had heard of the loss of a 50*l.* note, stated that he (the prisoner) thought he knew parties who had found one, and he asked Nickley whether the finders would be justified in appropriating it to their own use, to which Nickley replied that they would not. At four o'clock the same afternoon the prisoner changed the note, and was, later in the same evening, found in possession of a considerable quantity of gold, with regard to which he gave several false and inconsistent accounts. He was then taken into custody, and on the following day, October 21, stated to a constable that when he was alone in his own house on Sunday, a tall man, whom he did not know, came in and offered him a 50*l.* note, for which he (the prisoner) gave him fifty sovereigns. The police officers previously told the prisoner that they were in possession of information that one Tay, who was known to the prisoner, had found the note, but Tay was not called, nor was any evidence given as to the part (if any) which he took in the transaction. Upon these facts I directed the jury, that the important question for them to consider was, at what time the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion that the prisoner either knew the owner, or reasonably believed that the owner could be found at the time when he first resolved to appropriate it to his own use, that is, to exercise complete dominion over it, then he was guilty of larceny. If, on the other hand, he had formed the resolution of appropriating it to his own use before he knew the owner, or had a reasonable belief that the owner could be found, then he was not guilty of larceny. I also told the jury, that there was no evidence of any other person having possession of the note after it was lost, except the prisoner, but that even though the prisoner might not be the original finder, still, if he were the first person who acted dishonestly with regard to it, and if he began to act dishonestly by forming the resolution to keep it for his own use after he knew the owner, or reasonably believed that the owner could be found, he would be guilty of larceny. The jury found the prisoner guilty upon the 1st count, and I request the opinion of the judges as to the validity of the conviction. The prisoner was discharged on the recognizances of himself and two sureties, to appear and receive judgment at the next sessions.

O'Brien for the prisoner.—The direction of the learned Recorder was wrong. To constitute larceny there must be a trespass; and there is no trespass if the prisoner acquires possession lawfully in the first instance. This direction makes the question of larceny

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or no larceny depend upon the formation of a dishonest intention in the mind of the prisoner after he has acquired the means of ascertaining the owner. That is contrary to all the authorities collected and commented upon in *R. v. Thurborn* (1 Den. C. C. 387; S. C. nom. *R. v. Wood*, 3 Cox C. C. 453), where Parke, B. observes:—"The result of these authorities is that the rule of law on this subject seems to me to be that if a man find goods that have actually been lost and appropriate them with the intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed that the taker would examine the chattel, as an honest man ought to do at the time of taking it; and if he did not restore it to the owner, the jury might conclude that he took it when he took complete possession of it *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel. To apply these rules to the present case, the first taking did not amount to larceny because the note was really lost, and there was no mark on it or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note, as proved, that he believed the owner could not be found; and therefore the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it *animo furandi*, and the point to be decided is whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently and afterwards appropriated it without knowledge of the ownership, it would not have been larceny; nor would it, we think, if he had done so, knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was punishable, as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than the others, and consequently no larceny." Again, in *Merry v. Green* (7 M. & W. 623, 632), the same learned judge remarked:—"It is said that the offence cannot be larceny, unless the taking would be a trespass, and that

is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass: and it seems also from *Wynne's case* (1 Leach, 413; 2 East, P. C. 664), that, if under the like circumstances he acquire possession and mean to act honestly, but afterwards alter his mind, and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny." The latter part of that sentence is qualified by a passage in the judgment in *Thurborn's case*, where the learned judge says:—"Some of the cases appear to have been decided on the ground of bailment determined by breaking bulk, which would constitute a trespass, as *Wynne's case*; but it seems difficult to apply that doctrine, which belongs to bailment, where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding." (b) The cases of *R. v. Leigh* (2 East, P. C. 694), and *R. v. Mucklow* (1 Moo. C. C. 160), are also strong to show that the *animus furandi* must exist at the time of the original taking. In the former the defendant saved some of the prosecutor's goods from a fire which happened in his house, and took them home to her own lodgings; but the next morning she concealed them, and denied having them in her possession. The jury, finding that she took them originally merely from a desire of saving them for and returning them to the prosecutor, and that she had no evil intention till afterwards, the judges held that it was a mere breach of trust, and not a felony. In the latter case, the defendant, to whom a letter, addressed to a person of the same name, was delivered by mistake, opened it, and appropriated to his own use the bill of exchange which it contained; yet it was held no larceny, because at the time when the letter was delivered to him he had no *animus furandi*.

Bittleston for the Crown.—The case of *R. v. Thurborn* was brought under the consideration of the Recorder; and construing his direction with reference to the facts stated, it does in substance follow the rule there laid down. It only means that the prisoner would be guilty of larceny, if when he first took complete possession of the note *animo furandi*, he then knew or had the means of knowing the owner. [ALDERSON, B.—The direction does not exclude the supposition that the prisoner in the first instance received the note with an honest intention, but afterwards altered his mind, and in a day or two resolved to appropriate it to his own use. But my brother Parke, in *Thurborn's case*, decided that the dishonest intention must exist as soon as the finder has taken the chattel into his possession so as to know what it is.] It is conceded that the very first moment of taking is not

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(b) *Wynne's case* was that of a hackney coachman, who abstracted the contents of a parcel left in his coach by a passenger.

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that at which the *animus furandi* and knowledge of the owner must exist to constitute larceny; because the chattel must be taken into the hand to ascertain what it is. The original possession, therefore, must necessarily be lawful in every case; and if the dishonest intention arising at the next minute may make the finder guilty of larceny, why may not the same dishonest intention arising afterwards have the same effect? What is a proper time for examining the thing may vary in different cases; and, if a man takes time to make inquiries, for the purpose of satisfying himself whether he can keep the chattel without risk of discovery, and ultimately resolves to appropriate it, is he to be held not guilty of larceny, because he did not immediately make up his mind to deprive the owner of it? It is stated generally in the text books (1 Bl. Com. 295, 5th ed.), that the finder of lost goods has a special property in them; and so, according to *Armory v. Delamirie* (1 Stra. 505), he has against all but the true owner; but as against the true owner he has no property whatever, and it is submitted, at all events with regard to marked property, that as between the finder and the loser, the possession of the former is, in law, that of the latter, so long as the latter intends to act honestly. He holds merely for the true owner; he has a bare custody; but as soon as he resolves to appropriate the goods to his own use he then converts that lawful custody into an unlawful possession; he commits a trespass; and is guilty of larceny, according to that class of cases, where the owner, by delivering goods to the prisoner, does not part with the possession, but gives him the charge or custody of them only. [ALDERSON, B.—What do you say to that part of the direction which supposes that the prisoner was not the original finder?] It makes no difference whether the prisoner himself picked up the lost note, or whether the person, who did, brought it to him and informed him of all the circumstances. That intermediate person might act with perfect honesty; and the prisoner receiving it under those circumstances would be in the situation of a finder. [MARTIN, B.—Suppose a man takes an umbrella by mistake, and, after keeping it for a few days finds the owner, but does not return it—is there a felonious taking? LORD CAMPBELL, C. J.—You must contend that there is.] Yes, there would be no change in the possession until the dishonest intention arose. [LORD CAMPBELL, C. J.—Can there be a mental larceny? ALDERSON, B.—There must be a taking, and it must be a taking *animo furandi*; but the taking and the intent are distinct things.] In the cases of carriers, where the bailment is determined by breaking bulk, there is in truth no fresh taking. The carrier has possession of all the goods delivered to him for the purpose of carriage; but when he begins to deal dishonestly with them there is a constructive taking; and Parke, B., from the observation which he makes on Wynne's case, in *Merry v. Green*, seems to have thought so.

LORD CAMPBELL, C. J.—I am of opinion that this conviction cannot be supported. Larceny supposes a taking *animo furandi*. There

must always be a taking; but in the present case it is quite consistent with the direction of the learned Recorder, that the prisoner might be guilty of larceny, though, when he took possession of it, with a full knowledge of the nature of the chattel, he honestly intended to return it to the owner whensoever he should be found; because he puts it, that the important question is, at what time the prisoner first resolved to appropriate it to his own use. But when was the taking? It is said, that whenever he changed his mind, and formed the dishonest purpose of appropriating the note to his own use, that then he took it constructively from the possession of the owner; but that dishonest purpose may have first come into his mind when he was lying in bed at a distance of many miles from the place where the note was. It seems to me, that that operation of the mind cannot be considered a taking, and that, as there was no taking except the original taking, which might have been lawful, the conviction must be reversed. It is unnecessary to go into authorities upon this subject, after the elaborate judgment of my brother Parke in *Thurborn's case*.

ALDERSON, B.—In order to constitute larceny, there must be a taking, as well as an intention to steal. The difficulty I feel in this case is, to know how a taking, honest at first, can be converted into a dishonest taking by the subsequent alteration of intention. It is clear, in this case, that the learned Recorder left it open to the jury to convict the prisoner, even if they thought that at first he took the note honestly, but that he afterwards changed his mind, then knowing the owner; and it is argued, that the formation of the dishonest intention alters the character of the possession, though the taking may have been a week before; but I think that that is a degree of refinement which would destroy the simplicity of the criminal law.

The other judges concurred.

Conviction quashed.

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COURT OF CRIMINAL APPEAL.

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WIGHTMAN, J., and TALFOURD, J.)

REG. v. POWELL. (a)

*Burglary—Intent to steal “goods and chattels”—Mortgage deeds.**An indictment for burglary charged an intent to “steal goods and chattels.” The jury found that the prisoner broke into the house with intent to steal certain mortgage deeds. The mortgage deeds were valid subsisting securities for money which the prosecutor had advanced to the prisoner :**Held, that they could not properly be described as “goods and chattels,” and that the indictment was not proved.*

THE following case was stated by Talfourd, J. :—

William Powell was tried before me at the last assizes for Brecon, on an indictment charging him with burglariously breaking and entering the dwelling-house of David Williams in the night time, with intent to steal goods and chattels therein.

Case.

The prisoner in 1843 borrowed of David Williams the sum of 600*l.*, and executed to him a mortgage in fee of freehold land, and in the year 1848 he borrowed of Williams the further sum of 200*l.* and executed another mortgage by way of further charge on the same land. Both deeds contained the provisoes of redemption and covenants for the payment of the principal and interest of the sums advanced. Williams, the mortgagee, brought an action of debt against the prisoner for the recovery of these sums remaining unpaid, which was pending and approaching trial when the burglary was committed.

The evidence proved that the prisoner committed the burglary in order to steal the mortgage securities; and in answer to a question put to the jury by me, after they had delivered a verdict of guilty, they stated that the offence was committed with intent to steal the mortgage deeds. In a bundle with the first deed, which had been kept in a drawer ransacked on the night of the burglary, was a satisfied and cancelled bond of a former mortgage belonging to Williams the mortgagee, and which was also afterwards kept

(a) Reported by A. BITTLETON, Esq., Barrister-at Law.

with both mortgage deeds; but these were, in fact, at the office of the mortgagee's attorney when the burglary was committed.

On the part of the prisoner it was objected that the intent was not properly alleged in the indictment, as though the mortgage deeds might be the subject of statutable larceny, as "valuable securities," they were not goods and chattels. I overruled the objection, thinking that the mortgage deeds being substantially securities for debts, and containing covenants to pay principal and interest were distinguishable from deeds, which as "savouring of the realty" were not the subjects of larceny at common law, and that the parchments on which the covenants were inscribed were chattels, if indeed the words "goods and chattels" might not be rejected as surplusage.

The prisoner was sentenced to ten years' transportation, but doubts having been suggested if he was properly convicted on the objection as applied to the facts, I present this case for the judgment of the Court of Criminal Appeal. The prisoner remains in this country under his sentence. The counsel for the prosecution also relied on the satisfied bond as, at all events, the subject of larceny.

The question for the Court is, whether the conviction is right.

January 24.

Slade (with him *Allen*), for the prisoner.—There is a fatal variance. The mortgage deeds are not "goods and chattels," They are either title deeds and not the subjects of larceny as savouring of the realty; or they are choses in action, or valuable securities,—and so only the subjects of larceny by statutory enactment,—applying to them, not as goods and chattels, but as valuable securities. [WIGHTMAN, J.—Would they go to the heir or executor?] There is some difference of opinion between the courts on that subject; but it is unnecessary to consider that question, because, if they would go the heir, then it is quite clear that the intention to steal them would not make the breaking and entering burglarious. So strict was the rule of the common law upon this subject, that not only were title-deeds themselves not the subject of larceny (*Reg. v. Westbeer*, 1 Leach, 12), but even the box which contained them was also deemed to savour of the realty. Thus Lord Coke says (3 Inst. 109), "So it is of a box or chest with charters, no larceny can be committed of them, because the charters concern the realty, and the box or chest, though it be of great value, yet shall it be of the same nature the charters be of: *et omne majus dignum trahit ad se minus*." [ALDERSON, B.—I suppose, then, that if a lion was stolen in a cage, it would be said that the cage was *feræ naturæ*.] The statute 7 & 8 Geo. 4, c. 29, s. 23, does not help the case; because if the deeds are evidence of title to the realty it makes it a misdemeanor only to steal them; and of course breaking into a house with intent to commit a misdemeanor is not burglary. But supposing them to be "valuable securities," within s. 5 of 7 & 8 Geo. 4, c. 29, the stealing of them is only made felony by that statute, they being at common law mere

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choses in action, and not the subject of larceny, because of no intrinsic value. They, therefore, cannot be described in an indictment as goods and chattels. It is true that in *Reg. v. Perry* (1 Den. C. C. 69, 1 Cox Crim. Cas. 222), a void cheque was held to be properly described in one count of an indictment for larceny as "one piece of paper of the value of one penny," but there the instrument purporting to be a cheque turned out, upon inspection, not to be one; and so, perhaps, in this case if the parchments had turned out not to be what they professed to be, but mere waste parchment, they might have fallen within the description of goods and chattels. If valuable securities might always have been described as goods and chattels, and treated as a picture or a map, without reference to the nature of their contents, what necessity was there for passing the statute, which makes it felony to steal valuable securities? If, in *Reg. v. Perry*, there had been but one count charging a larceny of a piece of paper, and, upon the evidence, that piece of paper had turned out to be a valid cheque, then the variance would have been fatal, as it is here. [TALFOURN, J.—How do you distinguish this from *R. v. Vyse* (1 Moo. C. C. 218)? Some of the judges doubted there whether the pieces of stamped paper were valuable securities; but all thought that they were goods and chattels.] There the notes had been paid in London, and were in possession of a partner in the banking firm, who was taking them into the country to be re-issued, when they were stolen. They were, in truth, not valuable securities at the time when they were taken; and they were therefore goods and chattels. [WIGHTMAN, J.—Mortgages are chattels real. ALDERSON, B.—But the indictment must be understood of such goods and chattels as are the subject of larceny. (He referred to *R. v. Watts*, 4 Cox C. C. 336.) JERVIS, C. J.—In that case the cheque had been paid, and returned to the drawers.] The words "goods and chattels" cannot be rejected as surplusage; because then the indictment would charge simply an intent to steal therein; and there are many things, the stealing of which is not felony.

JERVIS, C. J.—It should have alleged an intent to commit felony therein.

Cur. adv. vult.

Judgment.

JERVIS, C. J., now delivered the judgment of the court.—After reading the case, his lordship said:—The case assumes, that the prisoner broke and entered the house, with intent to steal the mortgage deeds, they being securities for money. It is, therefore, quite unnecessary to deal with the question whether mortgage deeds, containing covenants to pay, are distinguishable from deeds savouring of the realty; because securities for money are not goods and chattels. (*Calye's case* (b), 8 Rep. 33 a.; *Chanell*

(b) In *Calye's case* it is said: "which words (*bona et cattalla*) do not of their proper nature extend to charters, and evidences concerning freehold or inheritance, or obligations, or other deeds or specialities, being things in action."

v. Robotham (c), Yelv. 68.) The case of *R. v. Vyse* (1 Moo. C. C. 218) was different; the notes had been paid; they had become mere paper and stamps, the property of the prosecutor; and were therefore his goods and chattels. In this case, the mortgage securities were not satisfied. We therefore think that the conviction was wrong.

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Conviction reversed.

Scotland.

HIGH COURT OF JUSTICIARY.

(Before LORD JUSTICE CLERK, LORDS COLONSAY and COWAN.)

November 17, 1851.

H. M. ADVOCATE *v.* BURNET AND OTHERS.

Evidence.

A letter is admissible in evidence to prove identity of an absent accomplice.

BURNET was charged with stealing a 50*l.* Bank of England note, and Masterton as an accessory in disposing of it. Masterton was outlawed for non-appearance. In proceeding with the case, *quoad* the theft, the prosecutor proposed to prove and produce to the jury a letter, written by Masterton from London, where he had been apprehended on presenting the note at the Bank of England.

Brown objected that this evidence was incompetent against Burnet; that even had Masterton been at the bar the statements in his letter could not have been received against Burnet. *A fortiori*, no letter of Masterton's could be evidence against Burnet, the only party now being tried.

Young, A. D., and the *Solicitor-General*, for the prosecution, explained that his only object in producing the letter was to identify Masterton with the person alleged to be dealing with the stolen property.

(*c*) In *Chanell v. Robotham*, which was an action of trespass for taking goods and chattels, it was held that the plaintiff was not entitled to recover a bond or the value of it under that description.

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The COURT held that the prosecutor must first establish some connexion or communication between Burnet and Masterton.

A witness was then called, who proved that Burnet, two or three weeks previous to the alleged theft, had been seen occasionally in the shop of Masterton, who carried on business as a spirit dealer in Edinburgh.

The COURT held this sufficient, and then allowed the brother of Masterton to examine the letter written from London, and prove that it was in the handwriting of Masterton.

COURT OF QUEEN'S BENCH.

November 21, 1851.

REG. v. THE INHABITANTS OF WAVERTON. (a)

Indictment for non-repair of highway—Reference from one count to another—Sufficiency after verdict.

The 1st count of an indictment alleged that a certain highway, in the township of W., was out of repair, and that the inhabitants of the said township were by custom bound to repair it.

The 2nd count, after alleging a custom for the inhabitants of the township to repair all roads within it, which otherwise would be repairable by the parish, proceeded thus: "That the said part of the said common highway hereinbefore mentioned to be ruinous and in decay as aforesaid, was a common highway, which but for the said usage would be repairable by the parish at large; and that by reason of the premises, the inhabitants of the township ought to repair and amend the same part of the said common highway, so being ruinous and in decay as aforesaid, when and so often as it hath been and shall be necessary; and that the inhabitants of the township have not yet done the same.

A verdict of not guilty having been found upon the first count, and of guilty upon the second:

Held, upon a motion in arrest of judgment upon the second, that that count sufficiently referred to the first to import into it the allegations contained in the first count, that the road was situate in the township of W., and was out of repair.

INDICTMENT for the non-repair of a highway.

The 1st count alleged that on, &c., there was, and from thence hitherto hath been, and still is, a certain common Queen's highway

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

in the said county, used for all the subjects of our said Lady the Queen, to go, return, pass, and repass, ride and labour, on foot and on horseback, and with cattle, carts, and carriages at their will and pleasure, and that a certain part of the said last-mentioned common Queen's highway, situate, lying, and being in the township or district of Waverton, otherwise called Waverton High and Low, in the parish of Wigton, in the county aforesaid, called Yeven's highway, leading from, &c. (particularly describing it), on the day and year aforesaid, and from thence continually, hitherto, until the day of the taking of this inquisition, at the parish and in the township or district last aforesaid, in the county aforesaid, was and is yet very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that, &c.

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2nd Count.—That within the parish of Wigton aforesaid, &c., from time whereof, &c., there had been and still are divers townships or districts whereof the township or district of Waverton, &c. is one, and that the inhabitants of the said township or district of Waverton, &c., from time whereof, &c., have repaired and amended and have been used and accustomed to repair and amend, and of right ought, &c., when and so often as it hath been or shall be necessary, such and so many of the common highways situate, and being within the township or district of Waverton aforesaid, as would otherwise be repairable and amendable by the inhabitants of the said parish at large, and that the said part of the said common highway hereinbefore mentioned to be ruinous, deep, miry, broken, and in decay as aforesaid, was a common highway, which, but for the said prescription or usage, would be repairable and amendable by the inhabitants of the said parish of Wigton at large; and that by reason of the premises, the inhabitants of the township or district of Waverton aforesaid, in the parish aforesaid, during all the time last aforesaid, ought to have repaired and amended, and still ought to repair and amend, the same part of the said common highway so being ruinous, deep, miry, broken, and in decay as aforesaid, when and so often as it hath been and shall be necessary. And the said inhabitants of the said township aforesaid have not yet done the same, to the evil example of all others in like cases offending, and against the peace of our said Lady the Queen, her crown and dignity.

Indictment.

The 3rd count was, in substance, the same as the 2nd.

This indictment was tried before Williams, J., at the last assizes for the county of Cumberland, when a verdict of not guilty was entered on the 1st count, and a verdict of guilty on the 2nd and 3rd.

Knowles, in this Term, obtained a rule *nisi* to arrest the judgment on those counts, on the ground that they neither alleged that the road was out of repair, or that it was within the indicted township.

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Temple and Pickering showed cause.—These counts are made
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good by reference to the 1st count. They allege the liability of the defendants to repair the said road so being ruinous; and that is either of itself an allegation that the road is ruinous, or it imports into the 2nd the express averment contained in the 1st count. So it was not necessary to repeat the description of the road, given very fully in the 1st count; it is enough to refer to that description, as is done in the 2nd and 3rd counts. At all events, the verdict cures the defect; because the jury could not have found the defendants guilty, unless the road was out of repair, and within the township of Waverton: (1 Wms. Saund. 228, n. 1; 2 Wms. Saund. 60, c.; *R. v. Aylett*, 1 T. R. 63; *R. v. Craddock*, 2 Den. C. C. 31; *R. v. Waters*, 1 Den. C. C. 356; *R. v. Boyall*, 2 Burr. 832; *R. v. Somerton*, 7 B. & C. 463.)

Knowles, Atherton and Unthank, contra.—A verdict will cure a defective mode of stating a title; but will not supply the omission to state one at all; and here no title at all is stated. There is nothing in the 2nd or 3rd count which necessarily imports that the defendants are guilty of not repairing a road which is out of repair in the township. Nor are there any sufficient words of reference to help it. "So being ruinous," in the concluding allegation, which merely states a conclusion of law, means only "so described to be ruinous." It is descriptive only; it identifies the road, and does not allege that the road is in the state described in the 1st count. The same observation applies to both objections. [LORD CAMPBELL, C. J.—The 2nd count says, "The same part of the said common highway;" then, in the 1st count, that part is described as being in the township.] There must be express words of incorporation: (*R. v. Martin*, 9 Car. & P. 215.) [COLERIDGE, J.—*R. v. Waters* seems also in your favour; for there "the said child" was held not to import an averment that the child was of tender years, contained in a previous count.] The substance of the offence, at least, ought to be definitely and positively charged. *Sir N. Poynt's case* (Cro. Jac. 214); *Johnson's case* (Cro. Jac. 610); *R. v. Hazell* (13 East, 139.)

Cur. ad. vult.

Argument.

Judgment.

LORD CAMPBELL, C. J., now delivered the judgment of the court. (b)—In this case the verdict was for the defendant on the 1st count, and for the crown on the 2nd and 3rd. The 2nd and 3rd counts of the indictment in this case are drawn very inartificially; but we think that after verdict they may be supported. The allegations to which our attention was directed, when the motion was first made for arresting the judgment, certainly do not simply charge that the road was out of repair, namely, "that the said part of the said common highway hereinbefore mentioned to be ruinous, &c., was a common highway, which," &c.; this is only a description of the highway, and not an allegation that it was actually out of repair; but then follows an allegation "that

(b) Lord Campbell, C. J., Patteson, J., Coleridge, J., and Wightman, J.

the inhabitants of the township ought to repair and amend the said part of the said common highway so being ruinous, &c., as aforesaid, when and so often as it had been and shall be necessary, and that the said inhabitants of the said township have not yet done so." Here we have a specific reference to the 1st count, which contains a formal allegation that this part of the highway was out of repair. There are many authorities to show that one count in an indictment may refer to another, and that under such circumstances the maxim applies *verba relata inesse videntur*. The objection that the 2nd and 3rd counts do not show the part of the highway out of repair to be in the township, admits of a similar answer. The 1st count alleges that "a certain part of the said highway, situate, lying and being in the parish of Waverton, &c. (describing it and stating its width), was and is ruinous." And the 2nd and 3rd counts allege, "that the said part of the said common highway hereinbefore mentioned to be ruinous, &c., was a highway which the inhabitants of the township were bound to repair." It has been determined that any qualities averred to belong to any subject in one count of the indictment, if they are separated from it, shall not be supposed to be alleged as belonging to it in a subsequent count, which merely introduces it by reference; but the local situation of the part of the highway described must necessarily and invariably belong to it, and if you describe it as in a particular township, when there is afterwards enough to identify it as being what is so described, a repetition of the allegation, seems not to be strictly necessary. We must very much regret the negligence in framing indictments which cause such discussions; but, we are happy to add, that in this case it has not led to a failure of justice; and the rule for arresting judgment must, therefore, be discharged.

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Rule discharged.

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES, 1851.

July 28.

(Before Mr. JUSTICE ERLE.)

REG. v. DUFFIELD AND OTHERS. (a)

Conspiracy—Combination among workmen—Right to combine—Interference with third parties—Conspiracy to compel manufacturer to raise wages—Evidence—Admissibility of printed handbills and speeches of co-conspirators.

- 1st. *It is a clearly established rule of law that workmen have a right, while they are perfectly free from engagement, and have the option of entering into employment or not, to agree among themselves that they will not go into any employment, unless they can get a certain rate of wages, and each man, for himself, may say, "I will not go into any employ unless I can get a certain rate of wages;" and all of them may say, "we will agree with one another, that in our trade, as able-bodied workmen, we will not take employ unless the employers agree to give a certain rate of wages."*
- 2nd. *But workmen have no right to combine together to persuade men already hired by and in the employ of other masters to leave that employment, for the purpose of compelling those masters to raise their wages.*
- 3rd. *Therefore, a conspiracy to obstruct a manufacturer in carrying on his business, by inducing and persuading workmen who had been hired by him, to leave his service, in order to force him to raise his rate of wages, or to make an alteration in the mode of conducting and carrying on his trade, is an indictable offence; and an agreement to induce and persuade workmen under contracts of servitude for a time certain, to absent themselves from such service, is an indictable offence, although no threats or intimidation be proved, or any ulterior object averred.*
- 4th. *Workmen who agree that none of those who make the agreement will go into employ unless for a certain rate of wages, have no right to agree to molest, or intimidate, or annoy other workmen in the same line of business, who refuse to enter into the agreement, and who choose to work for employers at a lower rate of wages; and, semble, such agreement to molest or intimidate is an indictable conspiracy, as well in relation to workmen willing to be hired and employed, as to those already hired and employed.*
- 5th. *In these cases, the essence of the offence is the combination to carry out an unlawful purpose, and the unlawful combination and conspiracy is to be inferred from the conduct of the parties. If several persons take several steps, all tending towards one obvious purpose, it is for the jury to say whether those persons had not combined*

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

together to bring about that end which their conduct so obviously appears adapted to effectuate.

- 6th. *P.*, a manufacturer, having been applied to by *R.*, the secretary of a trade society, and by other persons, to adopt a particular scale of prices, refused to comply, and immediately afterwards the defendants and *R.* were severally seen about the manufactory of *P.*, watching, and in conversation with his workmen; and at the same time a printed placard, signed by *R.*, was distributed, stating that *P.*'s wages were below the average. This was followed by the desertion of *P.*'s workmen, some of whom were seen in the company of one of the defendants, who was also proved to have proposed and assisted with money and otherwise, in effecting the removal of such workmen to distant parts of the country. Evidence was also given of the defendants being seen together on other occasions, and at "shop" meetings relating to the wages of the workmen. Held, evidence of a conspiracy by the defendants to induce and persuade *P.*'s workmen to leave his service, in order to compel him to raise his wages.

- 7th. Held also, that the above circumstances, with the additional fact that *P.* having advertised for workmen, persons offered, and were accepted as workmen, and agreed to come on the following day, but none of them did come, was evidence to support a count charging the defendants with conspiring by molesting and obstructing such workmen as might be willing to be hired by *T.*, to prevent them from hiring themselves to him.

- 8th. If persons conspire together to take away the workmen of a manufacturer, that constitutes such an obstruction and molestation of him as to support that part of a count which alleges a conspiracy by molesting and obstructing him.

- 9th. If a handbill says that certain things will be done by certain persons, and that handbill is circulated where it is probable those persons would see it, and they do the very thing that the handbill indicates they would do, the contents of the handbill are admissible in evidence against them; but, semble, that a handbill declaratory of the intentions of certain persons, is not evidence against parties not expressly named in it, although there is evidence from which it may be inferred that they assisted in carrying out acts indicated in the bill, and that they co-operated with the person whose signature is affixed to the bill, the evidence of such connexion stopping short of proof of agency, or of a conspiracy between all the parties existing at that time.

- 10th. In order to render the speech of a third person at a meeting admissible in evidence on an indictment for conspiracy against third parties, not present at that meeting, it must be shown either that such third person was co-operating at that time with the defendants as a co-conspirator, and engaged with them in one common purpose, or that he was acting as the agent of the defendant. Therefore, on an indictment for conspiring to intimidate and seduce workmen, evidence that the defendants and third parties were watching and speaking together, under circumstances from which the prosecution sought to establish the charge of conspiracy, was held insufficient to let in a speech made by one of such third persons in the absence of the defendants, for it was not to be assumed that the parties were watching and speaking for the purpose of intimidating and seducing workmen, for that was the actual issue in the case.

- 11th. The only principle of admitting what *A.* says in the presence of *B.*

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in evidence against B., is founded upon the supposition that B. would say "it is not true," if it was not true, and his silence goes to the jury as evidence from which an assent may be inferred. But that which is said by a man in a judicial position is often not assented to by those who hear it, and they have not an opportunity of arguing it, and, therefore, it is not admissible in evidence against them.

12th. *A prosecutor having applied to the mayor of a town for protection against certain parties, the mayor, after hearing both sides of the question, expressed an opinion: Held, that the witness cannot be asked, on cross-examination, what the mayor said; and, semble, that it is immaterial whether what the mayor said was in the nature of a judgment, a decision, or a mere opinion.*

13th. *A witness may name a written instrument, although not produced. A witness may, therefore, state that at a certain period he entered into "contracts" with his men, without producing them at the time.*

THE defendants, George Duffield, Thomas Woodworth and John Gaunt, were indicted for conspiracy. The indictment contained twenty counts.

The 1st count was as follows:—

"Staffordshire to wit.—The jurors for our Lady the Queen, upon their oath present, that heretofore, before and at the time of the committing of the offence hereinafter in this count mentioned, one Edward Perry carried on trade and business as a manufacturer of japanned and tin wares at Wolverhampton, in the said county of Stafford, and that divers, to wit, fifty persons, were workmen, and were hired and employed by and worked as workmen for the said Edward Perry, in his said trade and business; and the jurors aforesaid, upon their oath aforesaid, do further present, that George Duffield, late of the parish of Wolverhampton, in the said county of Stafford, labourer, Thomas Woodworth, late of the same place, labourer, and John Gaunt, late of the same place, labourer, with divers other evil-disposed persons, on the fifth day of October, in the year of our Lord, 1850, with force and arms at the parish aforesaid, in the county aforesaid, did amongst themselves unlawfully conspire, combine, confederate and agree together by unlawfully molesting the said workmen so hired and employed by and working for the said Edward Perry in his said trade and business as aforesaid, to force and endeavour to force the said workmen so hired and employed by and working for the said Edward Perry as aforesaid, in his said trade and business as aforesaid, to depart from their said hiring, employment and work, to the great damage of the said Edward Perry, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity."

The 2nd count was the same as the first, only, instead of alleging that the conspiracy was by unlawfully "molesting" the workmen, alleged it to be "by unlawfully using threats to the said workmen."

The 3rd count alleged the means used to be "by unlawfully intimidating the said workmen."

The 4th count was as follows:—

"And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, before and at the time of committing of the offence hereinafter in this count mentioned, the said Edward Perry carried on trade and business as a manufacturer of japanned and tin wares at Wolverhampton aforesaid, in the county aforesaid, and that Frederick Orchard, William Whessell, James Smith, Richard Cole, and Henry Summerfield were workmen, and were hired and employed by and worked as workmen for the said Edward Perry in his said trade and business; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said George Duffield, the said Thomas Woodworth, and the said John Gaunt, with divers other evil-disposed persons, on the day aforesaid, in the year aforesaid, with force and arms at the parish aforesaid, in the county aforesaid, did amongst themselves unlawfully conspire, combine, confederate and agree together by unlawfully molesting the said Frederick Orchard, William Whessell, James Smith, Richard Cole and Henry Summerfield, the said workmen so hired and employed by and working for the said Edward Perry in his said trade and business as aforesaid, to force and endeavour to force the said Frederick Orchard, William Whessell, James Smith, Richard Cole and Henry Summerfield, so hired and employed by and working for the said Edward Perry as aforesaid, in his said trade and business as aforesaid, to depart from their said hiring, employment and work, to the great damage of the said Edward Perry, the said Frederick Orchard, William Whessell, James Smith, Richard Cole, and Henry Summerfield, to the evil example of all others in the like case offending, and against the peace," &c.

The 5th count differed from the fourth in substituting "Edward Thompson" for the workmen mentioned in that count, and in alleging the means used to be "by unlawfully using threats to the said Edward Thompson."

The 6th count was similar to the fourth and fifth, but alleged "Edward Thompson and Thomas Harper" to be the workmen, and the means used, to be "by unlawfully intimidating the said Edward Thompson and the said Thomas Harper."

The 7th count was similar to the first, but instead of the allegation that the means used were by "unlawfully molesting the said workmen," alleged them to be "by unlawfully molesting the said Edward Perry."

The 8th count was the same as the seventh, but alleging the means used to be "by unlawfully obstructing the said Edward Perry as aforesaid in his said trade and business as aforesaid."

The 9th count was as follows:—

"And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, before and at the time of the committing of the offence in this count mentioned, one Edward Perry carried on trade and business as a manufacturer of japanned and tin wares at Wolverhampton aforesaid, in the county aforesaid; and the jurors aforesaid, upon their oath aforesaid, do further present, that

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the said George Duffield, the said Thomas Woodworth, and the said John Gaunt, with divers other evil-disposed persons, at the parish aforesaid, in the county aforesaid, with force and arms on the day aforesaid, in the year aforesaid, did unlawfully conspire, combine, confederate and agree together by molesting the said Edward Perry to force and endeavour to force the said Edward Perry, so carrying on his trade and business as aforesaid, to make an alteration in the mode of conducting and carrying on his trade and business as aforesaid, to the great damage of the said Edward Perry, to the evil example of all others in the like case offending, and against the peace," &c.

The 10th count, after alleging that Edward Perry carried on trade and business as a manufacturer of japanned and tin wares at Wolverhampton, and that divers, to wit fifty, workmen were hired and employed and worked for him, alleged that the defendants, with divers other evil-disposed persons, on the day aforesaid, in the year aforesaid, with force and arms, &c., "did unlawfully conspire, combine, confederate and agree together by obstructing the said Edward Perry, by inducing and persuading the workmen in the hiring and employment of the said Edward Perry, so carrying on business as aforesaid, to leave their hiring, employment and work, to force and endeavour to force the said Edward Perry, so carrying on trade and business as aforesaid, to make an alteration in the mode of conducting and carrying on his said trade and business as aforesaid, to the great damage," &c.

The 11th count alleged "that divers persons were being hired and employed as workmen for the said Edward Perry in his said trade and business," and that the defendants, with others, "did amongst themselves unlawfully conspire, combine, confederate and agree together, by molesting and obstructing such workmen as might be willing to be hired and employed by the said Edward Perry in his said trade and business as aforesaid, and who were not then hired and employed by the said Edward Perry, or by any other person to prevent and endeavour to prevent the said workmen, so willing to be hired and employed by the said Edward Perry, in his said trade and business as aforesaid, from hiring themselves to and from accepting work and employment from the said Edward Perry as aforesaid, in his said trade and business as aforesaid, to the great damage of the said Edward Perry," &c.

The 12th count was the same as the eleventh, only alleging the means to be "by unlawfully using threats and intimidation to such workmen," &c.

The 13th count was as follows:—"And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, before and at the time of the committing of the offence hereinafter in this count mentioned, the said Edward Perry carried on trade and business as a manufacturer of japanned and tin wares, at Wolverhampton aforesaid, in the county aforesaid, and that divers, to wit fifty, persons, being artificers, had contracted with the said Edward Perry to serve him as workmen and artificers in his said trade and

business for certain times and periods, respectively agreed upon between them and the said Edward Perry, and that the said persons so being such artificers as aforesaid has entered into the service of the said Edward Perry as such manufacturer as aforesaid; and the jurors aforesaid, upon their oaths aforesaid, do further present, that the said George Duffield, the said Thomas Woodworth, and the said John Gaunt, together with divers other evil-disposed persons on the day aforesaid, in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, did amongst themselves unlawfully conspire, combine, confederate and agree together by divers subtle means and devices to induce and persuade the said artificers, so having contracted with the said Edward Perry as aforesaid, to serve him in his said trade and business for certain times and periods so as aforesaid respectively agreed upon between them and the said Edward Perry as aforesaid, and so having entered into the service of the said Edward Perry as aforesaid, unlawfully to absent themselves from the said service of the said Edward Perry without the consent of the said Edward Perry, before the respective terms of their said contracts as aforesaid were completed, to the great damage of the said Edward Perry, to the evil example of all others in the like case offending, and against the peace," &c.

The 14th count alleged that, "before and at the time of the committing of the offence hereinafter in this count mentioned, the said Edward Perry carried on trade and business as a manufacturer of japanned and tin wares at Wolverhampton aforesaid, in the county aforesaid, and that one Frederick Orchard, being an artificer, had contracted with the said Edward Perry to serve him as a workman and artificer in his said trade and business for a certain time and period, to wit, for the period of one year, from the ninth day of September, A. D. 1850, upon certain terms then agreed upon between him the said Frederick Orchard and the said Edward Perry, and that the said Frederick Orchard, so being such artificer as aforesaid, had entered into the said service of the said Edward Perry as aforesaid; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said George Duffield, the said Thomas Woodworth, and the said John Gaunt, together with divers other evil-disposed persons on the day aforesaid, in the year aforesaid, with force and arms at the parish aforesaid, in the county aforesaid, did amongst themselves unlawfully conspire, combine, confederate and agree together by divers subtle means and devices, and illegal acts and practices, and by intoxicating the said Frederick Orchard, to induce and persuade the said Frederick Orchard, such artificer as aforesaid, and so having contracted with the said Edward Perry as aforesaid to serve him in his said trade and business for the said period, on the said terms so as aforesaid agreed upon between the said Frederick Orchard and the said Edward Perry as aforesaid, and so having entered into the service of the said Edward Perry as aforesaid, unlawfully to absent himself from the service of the said Edward Perry without the consent of the said

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Edward Perry, and before the term of his said contract as aforesaid was completed, to the great damage of the said Edward Perry, &c.

The 15th count was similar to the 14th, only substituting the name of "William Aston" for "Frederick Orchard," and alleging his contract of service with Mr. Perry to have been for "two years from the 7th day of November, A.D. 1850."

The 16th count alleged that the defendants, "with divers other evil-disposed persons, on the day aforesaid, in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, did unlawfully conspire, combine, confederate and agree together unlawfully to intimidate, prejudice, and oppress one Edward Perry in his trade and occupation as a manufacturer of japanned and tin wares, and to prevent the workmen of the said Edward Perry from continuing to work for the said Edward Perry in his said trade and occupation, to the great damage of the said Edward Perry, to the evil example of all others in the like case offending, and against the peace," &c.

The 17th count alleged that the defendants, with others, on, &c., with force and arms, at, &c., "did unlawfully conspire, combine, confederate and agree together by divers subtle means and devices and wicked acts and practices to injure, and oppress the said Edward Perry in his trade, business, and occupation of a manufacturer of tin and japanned wares, and to induce the workmen of the said Edward Perry to depart from their employment and work with the said Edward Perry before the period of their agreement with the said Edward Perry was completed, to the great damage of the said Edward Perry, the evil example of all others in the like case offending, and against the peace," &c.

The 18th count alleged that the defendants, with others, at, &c., with force and arms, on, &c., "wickedly intending to injure and oppress the said Edward Perry in his trade and business as a manufacturer of japanned and tin wares, did unlawfully conspire, combine, confederate and agree together by divers subtle means and devices, and by intoxicating and thereby rendering senseless the workmen of the said Edward Perry in his said trade and business, to convey to a distance and carry away the said workmen of the said Edward Perry, and thereby to prevent the said workmen from continuing to work for the said Edward Perry, and to injure, aggrieve, and oppress the said Edward Perry in his said trade and business as aforesaid, and to the great damage of the said Edward Perry," &c.

The 19th count alleged that the defendants, with others, on, &c., with force and arms, at, &c., "did unlawfully conspire, combine, confederate and agree together unlawfully to intimidate, prejudice, and oppress one Edward Perry in his trade and occupation as a manufacturer of japanned and tin wares, and to entice and seduce away the workmen of the said Edward Perry from the employment of the said Edward Perry, and thereby to injure and oppress the said Edward Perry in his said trade and occupation, to the great damage of the said Edward Perry," &c.

The 20th count alleged that the defendants, with others, at, &c., with force and arms, on, &c., "unlawfully did conspire, combine, confederate, and agree together by divers subtle means and devices, and by illegal acts and practices, and by molesting and rendering intoxicated the workmen in the employment of the said Edward Perry, and by inducing the said workmen to depart from the said employment of the said Edward Perry, and to break their contracts with the said Edward Perry, to force and compel the said Edward Perry to alter and thereby increase the amount of wages which he the said Edward Perry then was in the habit of paying to the workmen in the employment of him the said Edward Perry, to the great damage of the said Edward Perry, to the evil example of all others in the like case offending, and against the peace," &c.

Allen, Serjt., Huddleston, and Rupert Kettle for the prosecution.
Keating, Q.C., Skinner, and Vaughan for the defendants.

Allen, Serjt., stated the case, of which the following is the substance.—The prosecutor, Mr. Perry, was a manufacturer of tinplate ware at Wolverhampton. There were four or five similar establishments in the town. The trade, down to the spring of 1850, had been uniformly prosperous, finding full occupation to the men engaged in it, and affording reasonable and fair profit to those embarking their capital in it. It seemed to have been a trade little subject to changes, and he believed that down to the period in question there had been no dissensions of any kind between the masters and their servants. Down to that period Mr. Perry was the largest manufacturer of the kind in Wolverhampton, and he was in the habit of paying his workmen from 25s. to 2l. a week, according to the amount of work. Neither at that time nor before had there been any agreement between the masters to make the wages similar in all cases, but Mr. Perry had conducted his works on the principle he himself thought proper to lay down, on the scale of wages he thought proper to pay and the workmen thought proper to accept, without reference to the wages given by other masters. Mr. Perry also, in conjunction with his brother, carried on japan works, and the tin works and japan works were intimately connected—so intimately, that if the tin works were stopped, the japan works must stop also for want of materials, so that any sudden cessation in the trade of the tin works carried on by Mr. Edward Perry would have an injurious effect not only on that particular branch of the trade, but would also throw the japan workmen out of employ. That was the state of the trade up to 1850. Mr. Perry was in the habit of using machinery in his manufactory; other manufacturers did not use machinery, and there was some little difference in the rate of wages paid Messrs. Perry's men and the men in the employ of the other manufacturers, and this, probably, gave rise to what afterwards happened. The men in the employ of Messrs. Perry had the work prepared for them by machinery, and, consequently, the wages were different to those paid by the manufacturers who did not thus prepare their work. Down to April, 1850, not a word of com-

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plaint had been made against Mr. Perry by his workmen, and at that time he was full of orders, and giving full employment to every man, woman, and child engaged by him. It was under these circumstances that a certain class of persons associated together, not in Wolverhampton, but in London, thought proper to interfere. A letter was received by Mr. Perry from London. The seal of the letter contained the inscription, "National Association of United Trades, for the Employment of Labour," and the letter was as follows:—

"National Association of United Trades,
255, Tottenham Court Road,
London, April 2, 1850.

"SIR,—I am requested by the executive committee of the above association, to inform you that a deputation of their body, in conjunction with certain representatives of the tin-plate workers of Wolverhampton, purpose waiting upon you on Monday, the 8th April, instant, to take your opinion on the book of prices which has been left for your examination, and which the tin-plate workers are desirous should be established as the recognised price list for the town. I am further instructed to express, on the part of this committee, its sincere desire that, by the proposed interview an arrangement may be come to, which may in future contribute to the harmony and good feeling of both employers and workmen in your important and lucrative branch of manufacture. Mr. Frederick Green and Mr. Thomas Winter are the persons appointed by this committee to act in a mediatorial capacity on behalf of the tin-plate workers, and they venture to hope that you will receive them purely as mediators, and not as presuming to visit you in an offensive spirit of dictation.

"I have the honour to remain, Sir,

"Your most obedient humble servant,

"WM. PEEL, Secretary."

Mr. Perry having large orders on hand necessarily felt alarmed, because his experience had shown him—and the practice had been found to be—that disputes never took place between the men and the masters when work was slack; but when a trade was peculiarly prosperous, when orders were on hand, and it was known that they were pressing, that was the moment selected for embarrassing the employers. Aware of this, Mr. Perry sought to fortify himself, and he called his men in and asked them if they had any objection to enter into a written contract to work for him a certain time. Many of them, indeed the greater portion of them, said they had no objection. The amount of remuneration was settled and fixed, the men binding themselves for certain periods to work for Mr. Perry, and for Mr. Perry alone, at the scale of prices so fixed upon, Mr. Perry agreeing to supply them with work and wages under any and all circumstances. It seemed perfectly reasonable and reciprocal, that when the men undertook to devote their entire labours for the profit of their master, the

master should engage to find work for them under all circumstances. There was this little difference in the agreement, the men were to give six months' notice of their intention to leave the master, while the master on his part was bound only to give one month's notice. It seemed to be a just and reasonable contract, as Mr. Perry undertook, under any circumstances, to provide his men with employment and pay them their wages. But if it were not, it was an agreement such as the men thought fit to make, such as they had a right to make, and such an agreement as no stranger had a right to interfere with so as to induce the men to break it. Messrs. Winter, Green and Peel waited upon Mr. Perry at his counting-house, and made certain inquiries. They wished to know why he had dismissed a certain man from his employ. Mr. Perry declined to give any information upon that head, and upon that they said that they were come simply to settle the disputes which had existed between him and his workmen. Mr. Perry replied that he was unconscious of any disputes having existed between him and his men, and with regard to the book of prices, he said he would take the book and see whether the prices suited him or not. Mr. Perry thought it would be as well not to come to an open rupture, and they left upon the understanding that he would consider the prices and give them some answer. After several calls and inquiries had been made respecting the book of prices, in the month of July Mr. Perry said he would have nothing to do with it. From that time he was subjected to the annoyance and interference of which he had to complain, and had at length been compelled to institute proceedings against George Duffield, Thomas Woodworth, and John Gaunt, the parties included in the indictment. He (*Serjt. Allen*) would not at that moment produce printed placards which had been issued, because he was afraid it might be ruled by his lordship that he did not sufficiently connect the defendants with them. He would, however, say, that placards had been issued of an injurious tendency, and of the character of which they might judge if put in evidence. If the placards were admitted in evidence, then his task would be short; but if not, he should be able to connect the three defendants with all that was done by Peel and the others, and show that by their subsequent acts they carried out the conspiracy with which they were charged. A meeting of tinsmith workers had been held, at which Green, a person of the name of Rowlands, Peel, and others were present. At this meeting the three defendants, who were not workmen of Mr. Perry, accepted a regular employment, they became members of a secret local committee at Wolverhampton, at a salary of 4s. 6d. a day, and 6d. drink money. From that time Mr. Perry found a commotion among his workmen: he found that the three defendants were enticing them on, and that his men could not leave the works without being met by one, two, or three of the defendants. From that time men who had been in Mr. Perry's employ, who had received liberal wages and were good workmen, disappeared

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from their work and from the town of Wolverhampton. Many of these men had recently before entered into the contracts to serve Mr. Perry, as already observed. The men thus disappeared under the auspices of the defendants, and from eighty-five, the number of men was reduced to twenty-two, those twenty-two not being of the most able kind. The men selected to be taken from the works were the best workmen, the object being to embarrass Mr. Perry. Orders being pressing, Mr. Perry was obliged to go to France and Germany for workmen, and hire them at any cost. After a time the men dropped in again and returned to their old master, and it appeared they had been sent to all parts of the kingdom, some had even been sent to Ireland. The men received small pittance while away, and they returned penniless, miserable and starving. Proceedings were taken before the magistrates, and the three defendants were committed for trial, bail being afterwards taken for their appearance to answer the charge. He should show beyond all doubt that these three men, Gaunt, Duffield, and Woodworth, having accepted the office of secret local committee, and supplied with funds, got Mr. Perry's men, made them drunk, and in that state sent them off to Liverpool, Birmingham, Preston, and even Ireland. When away, the defendants supplied them with money by means of post-office orders. These were the facts of the case upon which the charge was brought. It would be for the jury to say, whether the three defendants, either or all of them, did conspire with others in using intimidation, threats or force, or by molesting, to induce or compel the men to leave their employment. The nature of the charge was,—first, they were charged with interfering by molesting and endeavouring to force the men to leave their work. The defendants were also charged with having interfered in the business of Mr. Perry, and by such molestation and interference inducing him to alter the mode of conducting his business; and there was another charge, that of preventing men hiring themselves to Mr. Perry.

Mr. Edward Perry, the prosecutor, was called and examined by *Huddleston*. He deposed to the receipt of the letter of the 2nd April, 1850, signed William Peel, secretary, read by Serjt. Allen in his statement, and also to a conversation with Peel, Rowlands, and Green, on the 8th April, when they tendered a book of prices for his adoption. The witness also stated that he had several interviews with Peel and Green between April and July. In that interval he got a considerable stock on hand, and entered into contracts with a number of workmen. [A paper was handed to the witness.] "This is a contract I entered into with a man named Frederick Orchard."

Huddleston (to the witness).—I believe you entered into many of those contracts with your workmen?

Witness.—I did from that time.

Keating, Q. C., interposed.—We shall hear of them when they come; (to the witness) I suppose all the contracts you entered into were in writing?

Witness.—They were.

Huddleston.—How many did you enter into?

Witness.—About fifty or sixty altogether.

Keating objected to evidence of any contract not produced. You cannot call pieces of paper contracts without proving them.

ERLE, J.—I think you may name the instruments always; but I will endeavour to take that which is legal evidence, and stop at the boundary: and this I take to be legal evidence: "After April I got a considerable stock in hand, and entered into contracts in writing with men about fifty or sixty in number: this with Orchard is one." (*b*)

The witness then proceeded to state that about the month of July, Peel, Green, and Rowlands, and one or two other persons called on him, and witness said he would have nothing to do with them. He would not allow third parties to interfere in his business. Peel said they were exceedingly sorry; things must take their course. After this time witness observed many strangers about his manufactory and premises, and among others, the three defendants, Duffield, Woodworth and Gaunt, and Rowlands also; they were there repeatedly, and in conversation with the workmen outside the gates. A hired workman named Haines had left without leave, and during his absence witness saw the defendant Duffield standing in the gateway, and a strange boy giving him a bundle of clothes; the boy, on being asked, said they were Haines' clothes. The workmen were continually holding "shop meetings" and discussions. After this time the workmen began to leave in couples. Between July and the end of the year about sixty men left. On the 27th of July the witness caused the following placard to be printed and distributed in Wolverhampton, and also advertised in the Birmingham papers:—

"To Journeymen Tin-plate workers.

"Wanted, twenty good workmen in the above line; constant

(*b*) In the case of *Reg. v. Rowlands and others* (see the next case), a similar objection was raised. Mr. George Henry Perry being under examination, having stated that nearly all his workmen who were not under written contracts had left him in July, the following questions were put to him: "At that time were these persons who were under written contracts, with you?" Witness.—"At that time there were fourteen or fifteen under written contracts." "When had those contracts been signed by them?" Witness.—"Some were five or six years old."

Whateley, Q. C. interposed.—The contracts must be produced.

ERLE, J.—"I think the question is regular: you may not ask as to the contents of a written instrument: but when a man has been in your employ you have a right to ask him whether he was employed by word of mouth or by writing, and if he was employed by writing, you may ask 'how long had he been in your employ.' Neither of those things are the contents of the written instrument. Mr. Huddleston's question is founded on the statement of the witness, that about that time fourteen or fifteen men were in his employment under written contracts. 'How long had they been in your service under the written contracts' is in effect the question."

In the progress of the case in the text (*Reg. v. Duffield and others*), a witness for the prosecution was asked whether he had been an apprentice of the prosecutor at any time.

Keating, Q. C. objected that it would appear from some document when he was apprentice.

ERLE, J.—The relation may be proved, although it may be created by deed. The relation of landlord and tenant may be proved, although created by deed. A man may say he was the servant of another, notwithstanding he was hired by writing. The witness may say he was an apprentice. (See also *Reg. v. Phillips*, ante, p. 329.)—[J. E. D.]

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employment will be given at the prices paid during the last eight years. Apply to Mr. Edward Perry, Jedds-works, Paul-street.

"N. B. Liberal advances will be made to steady workmen.

"Wolverhampton, July 24, 1850."

As soon as this document was published, witness saw the following placard posted about Wolverhampton and Birmingham, and particularly about the tin manufactories there:—

"Liberal advances to steady workmen.

"Notice.—Mr. Edward Perry having refused to give the list price agreed upon by the trade society to be paid to the journeymen tin-plate workers in Wolverhampton, has advertised for twenty good workmen at constant employment, at the prices paid the last eight years. The journeymen are informed that the prices Mr. E. Perry pays are from 25 to 30 per cent. under the prices paid at other manufactories in this town, and from 10 to 15 per cent. under the list agreed to by the men, which is the average between the prices paid by him and by Mr. Richard Perry, Mr. Walton, and Messrs. Shoolbred and Co.

"On behalf of the Committee,

"HENRY ROWLANDS, Secretary."

"Wolverhampton, July 24, 1850."

This witness then proceeded to give the following evidence. I also saw this hand-bill (a paper was put into the hands of the witness) circulated about the town. I saw it about the same time that I saw the defendants on my premises. The copies of this handbill were principally stuck in the windows of some of the beer-shops or public-houses. I saw one of them in the window of a public-house called "The Swan," which is frequented by the tin-plate workers. I believe I saw one in the Garrick's Head public-house: and I saw one at the Star beer-house. Peel and Green and Winters lodged there. A copy was also left at my manufactory. I have seen the three defendants continually going into the above houses, while that document was in the window.

Huddleston now proposed to have the hand-bill read.

Keating, Q. C. (after looking at it) objected that at present it was not evidence. It purports to emanate from a different body altogether. Seeing the heading and foot it seems to me it is not proper to be read.

[Mr. Justice Erle looked at the document. It was headed "Special application for an extra levy;" and was addressed "to the members of the several trade societies connected with the National Association of United Trades, by the Central Committee," and was signed "on behalf of the Central Committee, William Peel, Gen. Sec." (c)]

(c) See post, p. 423, and also this document at length in the next case, *Reg. v. Rowlands and others*.

ERLE, J.—I do not at present see that this is evidence. Of course you tender it in evidence as the act of these defendants, either by themselves or as being published by their authority?

Allen, Serjt.—Or recognised by them, my Lord.

ERLE, J.—Published by them or by their authority, and you may prove that either by showing they published, or adopted it after it was published. I have been looking back, and I do not find anything connecting them with it more than that it was in the windows of some of the public houses which these men were in the habit of going into and coming out of.

¶ *Allen*.—The evidence is that Peel, Green, and Winters lodged at the Star public-house during the time they were at Wolverhampton. The evidence is offered as showing what the intention of Peel and those persons who appear on the scene before the present defendants appear at all, was. This is their act, and is part of their conduct in pursuance of a conspiracy which was previously formed. The three defendants and Rowlands are found loitering about the manufactory at this very time. Rowlands was one of the persons who waited on Mr. Perry in the first instance with the letter and the price book. Rowlands and Peel, and others live at this house, in the window of which this placard is exhibited. It is submitted that this is within the principle upon which flags are exhibited in a procession, or any exhibition of placards at a meeting are received in evidence against persons taking part in those assemblies. The question was discussed on the trial of O'Connell.

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ERLE, J.—The gist of the bill was apparently for the purpose of compelling the scale of prices. As it purports to come from the local committee, it might very well be evidence against Rowlands, if he was on his trial; and as it purports to be in the name of the central committee, and Peel as secretary to the central committee said, in effect, "Rowlands is our local agent," it is to be presumed he must have seen it, and it is good evidence against Peel and Rowlands; (d) but I am at a loss in seeing the link as to the agency of Rowlands with respect to the three defendants who are charged with molesting workmen, or conspiring to molest workmen, and with conspiring to molest Mr. Perry.

Allen, Serjt.—What I purpose is, to connect, by their acts, the three defendants in this case with all that went before, and in which Rowlands and the others were instruments.

ERLE, J.—Then you will give in evidence those acts of the defendants that hereafter you will contend are in pursuance of what was propounded in that handbill. You may make a handbill admissible against a man, if I may so say, by retrospective light arising from his conduct. If a handbill says that certain things will be done by certain persons, and that handbill is circulated where those persons probably saw it, and they do the very thing that the handbill indicates they would do, when that is in evidence

(d) See the next case, *Reg. v. Rowlands*.

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I am of opinion that the bill would be admissible against them, but we are not at that stage yet.

[*Allen*, Serjt., then withdrew it for the present.]

ERLE, J.—I have made a note, “put in, objected to, and withdrawn.”

The witness then stated that his brother went to Paris, and that he subsequently had in his employment six French workmen, who remained about six weeks, and then left without notice. A few days after these men arrived the witness saw the defendant Duffield taking off one to the Garrick’s Head: witness and his brother went after him and brought him away from Duffield. The witness also deposed to the fact of workmen of the names of Thompson, Harper, Ireland, Jones, Brittain, Whessell, Smith, Cole, Summerfield, Whittington, Dance, Aston, and Short, who were under written contracts, leaving him without notice.

The witness being asked for the dates when these different persons left him, said, “I have a memorandum of all the dates when they left and when they came back,” and was about to refer to a paper, when

Keating, Q.C., interposed.—Was it made at the time they left?—No.

ERLE, J.—Did you enter it in a book when they left?—I know by their work when they went away. I had another document, which was on a rough piece of paper, and I have copied it out more neatly.

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Huddleston.—Was the other in your own handwriting?—It was, and made at the time.

ERLE, J.—Then it comes within the rule: this is a fair copy of a rough minute made at the time. That is evidence, as the witness swears it is a fair copy. He may read that. (e)

The witness then gave the dates from the copy-memorandum, and proceeded to state that in the whole he lost sixty workmen, and had subsequently employed Germans. That he advertised for workmen, and afterwards noticed strangers, having the appearance of workmen, coming towards his manufactory. Some were engaged to come on the following day, and they did not come.

On cross-examination by *Keating*, Q.C., the witness stated that in October he applied to the Mayor of Wolverhampton, as being the chief magistrate in the town, for protection, because his men

(e) Whether the witness can refresh his memory by referring to a mere copy of his original memorandum is a question of some difficulty and doubt. In several cases he has been allowed to do so, where, having looked at the copy, he was enabled to swear positively to the facts from *his own recollection*; but here it must be presumed, though some of the reports are silent on the subject, that the copy was made from the notes of the witness, either by himself or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy. Even then it may be questionable whether the copy should be used, so long as the original is in existence, and its absence unexplained: for there is much weight in the remark of Mr. Justice Patteson, who observes, that the rule requiring the production of the best evidence is equally applicable, whether a paper be produced as evidence in itself, or be merely used to refresh the memory. Be that as it may, thus much seems clear, that if the copy be an imperfect extract, or be not proved to be a correct copy, or if the witness have no *independent* recollection of the facts narrated therein, the original must be used: Taylor on Evidence, vol. 2, p. 934, and cases there cited.—[J. E. D.]

were continually annoyed and his manufactory beset by the tinplate workers going past it. The mayor expressed a wish to see the witness at the public office, and he attended. The mayor had invited the delegates from the National Trade Association to meet him there. Witness objected to their being present. There were several magistrates on the bench. Witness stated to the mayor the annoyances he had experienced, and claimed from him protection for himself, his workmen, and property. The delegates brought forward and discussed the rate of wages paid by the witness as compared with other manufacturers in Wolverhampton. The mayor permitted them to speak, but the witness objected to their interference.

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Keating was about to ask the witness whether the mayor and magistrates who were assembled upon that occasion did not express an opinion, whether rightly or wrongly, upon the matter, and what that opinion was, when

Allen, Serjt., objected that the question could not be asked.

Keating submitted that if the opinion was expressed to the prosecutor it was a proper question.

ERLE, J.—That which is said to a man may be said to be an admission of the truth of the fact, if the thing is said of a matter within his knowledge, and if he does not deny it; but that which is said by a man in a judicial position is often not assented to by those who hear it, and they do not often have an opportunity of arguing it. The only principle of letting what A. says in the presence of B. be admitted in evidence against B., is upon the supposition that B. would say, "it is not true," if it was not true. It goes to the jury whether he did not assent to it; but when a man is before the mayor and says, "I object to your going into this," and you ask him what the mayor said about the matter which he objected to, I think it cannot be held that he assented to the opinion expressed by the mayor.

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Keating.—I tender the evidence.

ERLE, J.—The witness says, "I was before the mayor in October, 1850;" then you propose the question, "What did the mayor say about this matter of the wages?"

Keating.—I will introduce it with another question. (To the witness): Did you wait until the mayor and the magistrates had taken time to deliver their decision or their opinion?—I did.

Did they retire to consider the matter?—They did.

By the JUDGE.—I told the mayor that I objected to either the mayor or the delegates, or any other person, interfering between me and my workmen, and that all I came for, was protection.

ERLE, J.—Then it will stand on this statement:—"I waited till the mayor and magistrates retired and returned and gave their opinion;" then comes the proposed question, "What did the mayor say?"

Keating.—I will put another question first. Were you there in consequence of an application you made to the mayor?—Witness: I was.

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Keating.—The prosecutor makes an application, there is a hearing and a decision, and I propose to give the decision in evidence. This is a judgment.

ERLE, J.—It is neither a decision or a judgment. It is a proposal of arbitration dissented from by one of the parties, and taken up by the other. The witness applied to the mayor; the mayor desired him to attend; the mayor asked him to meet the delegates; that, of course, means that the mayor intended to endeavour to mediate.

Keating submitted that at all events he had a right to have, as a fact, the view the mayor and magistrates took of it.

ERLE, J.—I am at a loss to know upon what principle. Suppose, on a trial for a misdemeanor, A. B. says in the street of the defendant, "That man is one of the guiltiest men I know, and is fit to be made a public example of," would you say that was admissible in evidence against him? Then if it is not admissible, would it be admissible if he said, "He is a particularly respectable man, a great friend of mine, and I think he ought to get off." I do not like to decide a matter in a hurry; but to my mind it is one of the most familiar points that that which is said by another tribunal is most particularly to be repudiated by a tribunal which is to form an opinion of its own.

Keating.—I propose to offer it in this way. The witness says he applied to the mayor for protection; he made an application to the mayor to do something or other; he appeared there, and other parties appeared there, to whose being heard the witness objected; the mayor, however, seems nevertheless to have heard them; he also heard what Mr. Perry and those with him had to state; and having heard that, he delivered an opinion, or a decision, or a judgment, or whatever it was, upon the matter of the application made to him. Now Mr. Perry, as I understand, and the other parties, wait while the mayor and the other magistrates retire in order to consider what their opinion, or decision, or judgment, ought to be, and they return and deliver an opinion, or judgment, or decision, and I propose to give in evidence what that was.

Allen, Serjt., objected.

ERLE, J.—I think I ought to give Mr. Keating the option of putting the question, "What did the mayor say?" and I, upon objection, rule in his favour, contrary to that which I have already held, and contrary to what I should say was my opinion, but I am always unwilling to reject evidence. If there is the least doubt about it, it is better always to admit it. My opinion is against its admissibility; nevertheless, I will admit it.

The witness then stated—The mayor said I had asked for protection and I should have it, but he went into a long tale about *quantum meruit* for wages. I do not know what it was—I thought it was a good deal of nonsense at the time.

Keating.—I have no doubt you recollect the pith of what was said. Was it not to the effect that the mayor and magistrates of the town were of opinion that you ought to give the wages which were given by Messrs. Shoolbred and Walton?

ERLE, J.—I gave you permission to ask what the mayor said. Now you put a further question which you suggest as the pith of what the mayor said, which is not *what* he said.

Keating.—If I am entitled to have what the mayor said, I may be permitted in cross-examination to put it, “Did he not say so and so?”

ERLE, J.—I am unable to see my way to this evidence, but if persisted in I will take it.

The witness then continued.—The mayor said if my agreement stated that I was to pay the same wages as were paid to other workmen in Wolverhampton, and there were no data to go by, the question would be, what was the *quantum meruit* of the town, and I ought to pay that.

Duncan M’Naughton, the prosecutor’s foreman, proved that after the period when his master refused to adopt the book of prices, persons were posted at various places near the manufactory. Witness had seen the three defendants and Rowlands together on various occasions, talking to the men in Mr. Perry’s employment. When witness went from the manufactory into the town of Wolverhampton, the defendants followed him, observing where he went. Rowlands did the same, but not so frequently. Rowlands was Secretary to the Tin-Plate Workers’ Society. The witness then confirmed the prosecutor’s statement as to the men leaving his employment. After advertising for workmen, parties of them came to the manufactory and asked for situations, and witness promised to put them to work, and yet they never appeared afterwards. On one occasion, after promising to set two men to work on the following day, witness went into a room at the Garrick’s Head frequented by the tinmen, and saw those two men sitting there, and the defendant Woodworth was there. The two men did not afterwards come to work. The effect of the workmen going away was to prevent Mr. Perry completing orders.

Samuel Shale proved that he was at a shop meeting, at Messrs. Walton’s manufactory, of their men, about September, 1850. Duffield was present. He said he had been in office and could do nothing, and would give it up. He applied for something, and it was said he was to have something allowed him for losing his time and doing the tinmen good. There was something proposed about a secret committee: the men proposed upon it were Woodworth and Gaunt, two of the defendants, and a man named Pitt, and the proposition was carried. These men were to receive 4s. 6d. a-day. Gaunt and Woodworth left their work after this meeting. A subscription of 4s. a-piece was soon after called for: the money went to the “Trade.” The witness afterwards saw Mr. Perry’s workman Orchard with Duffield and Woodworth at the Star, and deposed to a conversation between them. The witness had seen the defendants in the company of Green and of Rowlands many times between September and November.

Duncan M’Naughton was recalled, and stated that he was present at a meeting held in the theatre at Wolverhampton at the

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end of October, 1850. Peel and Green were at the meeting. They lodged at the Star at that time. Peel addressed the meeting. On the witness being asked what Peel said,

Keating submitted that the question could not be put.

ERLE, J.—I do not see how it is admissible. No defendant is at the meeting. Unless they are shown to be at the meeting, you must show that Peel was co-operating with them as a co-conspirator, which is assuming the *probandum*, or you must show that he was their agent. I do not see that he was agent, and at this stage I am not aware that there is evidence enough to contend that it is established that Peel and these men were engaged in one common purpose, and that in pursuance of that, Peel addressed that meeting.

Huddleston.—We show Peel and the defendants together, and Peel and Green afterwards acting with them.

ERLE, J.—You must show a combination for a common purpose. I do not know what this meeting was for, and it must be one of the purposes specified in the indictment.

Huddleston.—That is the way we propose to do it. We propose to show a public meeting, at which certain persons were present, which persons, we show, were associated with these defendants by their subsequent acts.

ERLE, J.—But you must show they were co-operating with them at this very time. You must show them parties to a conspiracy, and after you have once shown that, the act of each conspirator is admissible against the whole.

Huddleston submitted that had been done by showing Rowlands and the defendants watching and acting.

ERLE, J.—Watching and speaking; but then it is not quite to be assumed that they were watching and speaking for the purpose of intimidating workmen and seducing them. That is the actual issue in the cause; if that is to be assumed, we need not trouble ourselves any more. The evidence is not quite enough, I think.

Evidence was then given with respect to the abduction of Mr. Perry's workmen by intoxicating and intimidating them, tending to implicate the defendants. The only further evidence connecting the defendants with the acts of Rowlands, and *vice versa*, was as follows:—

Frederick Orchard, a witness, stated that at a meeting at the Swan tavern in October, 1840, he being under a written agreement with Mr. Perry, the defendants Woodworth and Duffield called him out of the room, and Duffield asked witness if he was willing to go away, and that if he would go they would allow him 12s. a-week. Witness agreed to go with four others by a midnight train on the following Saturday. Duffield said he (the witness) might get every bone in his skin broken if he did not go. Two days after, on the 18th of October, witness attended a meeting at the Garrick's Head. The three defendants and Rowlands, "the secretary," Green, Winters, and others, were there. Duffield said, speaking of the men in Mr. Perry's employ, that they did not mean

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to send any more artiled men away until the meeting was over at the theatre. On the 27th of October the witness was at the Star. Green and Winters lodged there. All the defendants were there, and Green, Rowlands, Winters, and others. They had a quantity of papers with them with the secretary's name attached. Woodworth said he was going to circulate bills about the town. He gave witness one. On the 6th of November witness was again at the Star. The defendant Duffield, in the presence of Woodworth, said he had got a situation for witness in Ireland. Witness expressed his unwillingness to go, saying he was a hired servant, and Duffield said, "You had better go, or else it will be worse for you." The witness was paid some money by Woodworth, and went off in a state of intoxication by the train from Wolverhampton to Chester, and thence to Cork.

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At the close of the evidence for the prosecution,

Allen, Serjt., again tendered the handbill in evidence which was found exhibited at the windows of the public-houses where Peel, Rowlands, and other parties lodged. (*f*) He submitted that, looking at the contents of the document, it contained an announcement which was subsequently carried out by the acts of the three defendants.

Skinner submitted that the connexion of the parties ought in the first instance to be shown before any internal evidence was given.

ERLE, J.—This is proposed to be put in upon the ground that it was in a situation where the defendants would probably see and read it. If it announced that they would perform certain acts, and afterwards they did the acts, then it would be admissible in evidence against them.

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Skinner contended that his lordship was not entitled to look at the document until in some way or other it was connected with the defendants.

ERLE, J.—The nature of a document is sometimes to be considered before you decide whether it is admissible or no. As at present advised, the balance in my mind is against the admissibility. It is sought to weigh down the scale by internal evidence. Before I say finally, "no," I think I ought to run my eye over it. I only read the first column when it was first offered.

Mr. Justice Erle then examined the handbill. [As already observed, it was signed by Peel, and was addressed to the members of the several trade societies connected with the National Association of United Trades by the central committee. It stated that the committee had been called upon by the tin-plate workers of Wolverhampton for advice and assistance to enable them to obtain from their employers an established book of prices for the town. It narrated interviews and negotiations with the manufacturers, and that "prices were proposed by Mr. E. Perry which would have placed the men in a worse position than they are in at pre-

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sent." The following were the portions of the handbill to which the counsel for the prosecution directed his lordship's attention:—

"In this position your committee were applied to by the committee of the tin-plate workers to support them in an attempt to force the original book upon the non-conforming employers, and that the association should support those who were members of the National Association, ninety-nine in number, or such of them as it might be necessary to take out, and that the trade should support those who were not members of the National Association.

"Your committee, considering this case as one for an advance of wages, did not consider itself warranted in pledging the association without the sanction of the members. They therefore submitted to the Tin-plate Workers' Committee the following propositions:—

"'1st. That the deputation from the central committee proceed to Wolverhampton on Monday, the 1st of July.

"'2nd. That the deputation be instructed to re-open negotiations with the men and their employers for a modified list of prices, upon a basis of the average of the prices now paid by Messrs. Shoolbred, Walton, E. Perry, and R. Perry.

"'3rd. That this committee draw up a memorial to the trades, explanatory of the case of the tin-plate workers, calling for their consent to such a levy as may be necessary to enable them to accomplish their objects in behalf of the tin-plate workers, in the event of their renewed attempt to settle the case by mediation failing.

"'4th. But should the attempts to settle this by mediation fail, and any arrangements beneficial to the men be gained by ulterior measures of a more coercive character, this committee beg it to be distinctly understood, that in the event of a depression, or through a relaxation in the organization of their trade, the employers attempt to reduce them to their present prices, this committee shall not be called upon to defend their position by pecuniary assistance.'"

"Your committee are powerfully impressed that when it becomes known that the just and reasonable claims of the tin-plate workers will be backed by the united and continuous support of the National Association, that the struggle will be short, that Messrs. R. and E. Perry, with all their wealth and influence, will not like to see their business passing away to their neighbours, or to other towns, who will be quite ready to receive it. Neither the men, nor your committee can be charged with precipitancy, or of having made any unreasonable demands."]

ERLE, J.—I do not see anything specifically referring to Duffield, Woodworth and Gaunt, who are the persons now on their trial. It seems to me that that is wanting. I can find a great deal about other persons; and from the line of examination taken here, if they had been on their trial it might have been a diffe-

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rent question. (g) The inclination of my mind is against its admissibility in this case.

[The evidence was accordingly rejected.]

Keating, Q. C. addressed the jury for the defendants. In the course of his address he made the following observations with respect to the law of conspiracy, as it affected combinations among workmen :—

“Conspiracy is a word very often used and sometimes misunderstood. Conspiracy, no doubt, is illegal; and conspiracy consists in combination. But you are not, therefore, to jump to the conclusion that every combination is illegal, or that every combination is a conspiracy. Of course, everything that is great that is done in this country is done by means of combination; and the question is, when you come to ask yourselves whether a particular combination constitutes a conspiracy or not, whether the combination is for a purpose which is in itself illegal, or which is meant to effect a purpose not in itself illegal, but by means which are themselves illegal; and I believe, gentlemen, that although, undoubtedly, the definition of conspiracy has been stretched somewhat beyond that; although I believe it has been said (though I cannot find any distinct authority for it) that that which would be no offence to do in one, would, if agreed to be done by more than one person, constitute an offence against the law, I believe that that doctrine rests on no legal foundation; and I believe that the only true and safe definition of conspiracy is that which I submit to you (of course with deference to what you will hear from my Lord), that it must be a combination for the purpose either of doing an illegal act, or of doing an act not in itself illegal, but by means which are illegal. I know of no other definition for that wide net called conspiracy, except that which I have the honour to lay before you, and which of course you will only receive subject to its being approved of when my Lord comes to lay down the law to you. Now, gentlemen, the general features of this indictment would seem to refer to the illegal acts of the defendants with reference to the wages which workmen in Wolverhampton were to receive from their employers; and I am sure that I address many who are perfectly well aware of what are the rights of masters and what are the rights of workmen under the present system of law. Masters have a perfect right, I apprehend, to combine together and agree to fix the rate of wages which they as capitalists shall give to their workmen; and, upon the other hand, the workmen have just as clear a correlative right to combine and meet for the purpose of fixing the rate of wages for which they will part with their labour. The one right is not more clearly ascertained than the other, nor does it rest upon any other foundation of law, or I would add, of justice than does the other of those rights; and, therefore, you are not to suppose, gentlemen, when it is paraded before you that workmen meet and discuss the

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(g) As to the effect of the placard as evidence against Peel and Rowlands, see the next case, *Reg. v. Rowlands and others*.

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rate of wages, or when it is put before you that they join in societies for the purpose of insuring their receiving such a rate of wages, you are not therefore to suppose that they are doing thereby an illegal act; for they are doing that which the law sanctions them in doing. But there is a point at which the law says they shall stop, and that point is very clear and very well defined; and, like all rules of law for a disobedience to which parties may subject themselves to criminal proceedings, it is broad and plain, and distinctly marked. It is this: whilst the workmen have a full right to meet and combine to fix the rate of wages at which they and their fellows will give their labour to the capitalist, they have no right whatsoever, by threats, by intimidation, by violence, by obstruction, or by molestation, to carry out their views; but so long as they carry out their object short of that, they have a perfect right to meet, to combine, and to fix their wages, and to agree amongst themselves that they will not work for less than certain wages. Nay more, as it was put by a learned and able Judge in a recent case, tried at Liverpool, (*h*) men have a right to meet and to agree that they will not work under a certain rate of wages. They have a right, if their fellows ask them, to tell them that they ought not to work under a certain rate of wages. They have a perfect right, in fact, staying short of conducting it by violence, obstruction, molestation, intimidation, or threats, by themselves, and others, to combine and to agree to the fixing a rate of wages, and to say that, except at that rate of wages, they will not give their labour to the capitalist. Now, gentlemen, accordingly, the present indictment, in its more prominent features, charges the defendants that they did conspire by threats, by intimidation, by obstruction, and by molestation, to prevent the workmen of Mr. Edward Perry, the prosecutor, from continuing at their work; and undoubtedly, if that were proved before you, it would sustain those counts of the indictment framed in that aspect of the case. There are also counts which refer generally to the servants of Mr. Edward Perry being so impeded; there are counts also which refer to particular servants being so impeded; but I believe that the gist of the indictment is with reference to the statute of the 6 Geo. 4, (*i*) and charges that

(*h*) Rolfe, B. in *Reg. v. O'Connor*, Liverpool spring assizes, 1847, not reported, but printed from the shorthand writer's notes.

(*i*) 6 Geo. 4, c. 129. This statute recites the 5 Geo. 4, c. 95, and that the provisions of that act have not been found effectual; that combinations of workmen are injurious to trade and commerce, dangerous to the tranquillity of the country, and especially prejudicial to the interests of all who are concerned in them; and that it is expedient to make further provision as well for the security and personal freedom of individual workmen in the disposal of their skill and labour, as for the security of the property and persons of masters and employers. The statute then repeals the 5 Geo. 4, c. 95, and enacts (sect. 3), that, "if any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any journeyman, manufacturer, workman, or other person, hired or employed in any manufacture, trade or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent or endeavour to prevent any journeyman, manufacturer, workman or other person not being hired or employed from hiring himself to, or from accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or property of another,

either by molestation, by intimidation, by threats, or by obstruction, the servants of Mr. Perry were prevented from continuing in his service generally, or that the particular servants therein named were so prevented. There are also counts in this indictment, which charge in general terms, a conspiracy by subtle means to induce and persuade artificers who had contracted with Mr. Edward Perry, to desert his service; and the charges, I believe, are rung upon that set of counts as to servants generally, and as to servants particularly. I believe, also, that there are counts framed on that view of the case as to conspiracy, to oppress and impoverish Mr. Edward Perry by various means which are stated, subtle means and wicked acts and artifices, and also by intoxicating and rendering senseless the workmen in his employment, and upon that set of counts, with reference to the intoxication of the workmen, I presume the case for the prosecution very mainly relies. Mr. Serjt. Allen has placed before you a view of the case, with reference to those counts of the indictment, which to me is quite new, but which, whether you will go along with him in his view, or whether you may hesitate to do so, I know not. The learned serjeant says, 'Is there any difference

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or threats, or intimidation, or shall molest, or in any way obstruct another for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association or not having contributed or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any rules, orders, resolutions, or regulations made to obtain an advance, or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any manufacture or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description, of his journeymen, workmen, or servants; every person so offending, or aiding, abetting, or assisting therein, being convicted thereof in manner hereinafter mentioned, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour, for any time not exceeding three calendar months."

Sect. 4 provides "that this act shall not extend to subject any persons to punishment, who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade, or business, or who shall enter into any agreement, verbal, or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work in any manufacture, trade, or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding."

Sect. 5 also provides "that this act shall not extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours or time of working in any manufacture, trade, or business, or who shall enter into any agreement verbal or written, among themselves, for the purpose of fixing the rate of wages or prices, which the parties entering into such agreement, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours or time of working in any manufacture, trade, or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding."

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between incapacitating a workman from performing his contract by a blow on the head or by pouring liquor down his throat, and so making him drunk?' Now, certainly, I should have thought there would be a good deal of difference in every point of view, between those cases so put. But I presume that the reason for putting it in that way was this, that it might be supposed that intoxication being used as a means to cause a workman to depart from his duty would not be sufficient, but that if you could bring yourselves to believe that intoxicating a man was exactly the same as giving a blow which would incapacitate him from performing his service, a conspiracy to intoxicate would be the same thing as a conspiracy to give the blow, and that, consequently, it would be a conspiracy to do an illegal act. * * * Gentlemen, the question, as I have before said, which you have to try will be this, whether there has been a conspiracy proved before you in which the defendants participated; for I am quite ready, of course, to admit that it is not necessary that it should be a conspiracy including the defendants, and the defendants alone; but whether there was a conspiracy in which the defendants participated to do an illegal act, either by legal or illegal means, or to do an act not illegal by means which are illegal. Now, I may at once, in order to clear the way to what I conceive to be the real point for you to try here, or rather, the real point to which you will have to apply the evidence in the case, admit that if you think the evidence of the witness Frederick Orchard, who was called before you, entitled to credit, he certainly, and he alone, mark you, speaks to that which would bring the defendants upon this record within the definition of persons doing that which is illegal, and which I have submitted to you; because he alone, of all the numerous witnesses who have been called before you, is the witness who put into the mouth of one of these defendants anything approaching to a threat. [After commenting upon the evidence of Orchard, *Keating* proceeded.] It is not my intention, upon the evidence, to contend that these defendants are not shown to have wished well to those who struck; nay, more, that they were not prepared to assist them after they had determined to go; but even if you should think that they had agreed so to assist them after they had determined to go, I should submit to my Lord that it is not an indictable conspiracy. Gentlemen, if the workmen have a right to combine for wages, I should submit that the workmen (I am now putting the contracts out of the question, for the present) have a perfect right not only to refuse to work for certain wages themselves, but they have a right to advise others not to work, except for certain wages; that they have a perfect right to do, and if they have a perfect right to do that, an agreement to do it cannot be illegal; and, therefore, looking at this case apart from the contracts, I should submit to you, under the direction of my Lord, that even if you were of opinion, which probably you would be, that these three defendants, in common with many others at Wolverhampton, were

very desirous that Mr. Perry's rate of wages should be raised, or should be altered, and were also very desirous that workmen should not work for him, except at the wages that other workmen got; nay, more, if, irrespective of contracts, they had advised them so to do, I apprehend that they would not be committing an indictable offence, because that which is lawful for one man to do, I apprehend, it cannot be a conspiracy for others to agree to do; and though I am aware, as I said before, that a contrary position has been put forward, I believe it will be found to rest on no foundation whatever, but on the contrary, the act, which it is the object of the men to do, must be clearly and distinctly an illegal act. My Lord, I am sure, will recollect a very strong case in which it was held by the full Court of King's Bench, presided over by Lord Ellenborough, that an agreement to enter upon land, and take hares, even at night, was not an indictable conspiracy, because, although the act no doubt was in itself illegal, still it was in the nature of a civil trespass, and could not be made the subject of an indictment for a conspiracy. (*k*) Now, that was a very strong case, for the doing of that very act was afterwards made highly penal. [ERLE, J.—A conspiracy to injure a man in his private property; a conspiracy to prevent all customers from coming to his shop—what is that but a civil injury?—a conspiracy to injure—two men combining to interfere with a man's civil right—is indictable.] I am perfectly aware that it is not easy to reconcile all the cases upon the subject of conspiracy. It is difficult to reconcile that case with many other cases, and especially with some *Nisi Prius* cases that there have been, or cases before a single judge, but I believe I have stated the case correctly, and I am not aware that it has ever been in terms overruled, and it illustrates what I was about to say: that, at all events, the law looks upon the charge of conspiracy as one which must clearly ascertain the object of the parties agreeing or combining, to be an illegal object, and an illegal object something beyond, at all events, what Lord Ellenborough in that case called a civil trespass. In the present case, I apprehend (always excluding the evidence of Orchard), that you have no evidence before you, but on the contrary, the evidence is the other way, that any one of these defendants, or any persons who are brought together with them, were the parties who induced any of the workmen to leave the employ of Mr. Edward Perry."

Keating subsequently contended to the jury, with respect to the counts respecting the breach of written contracts, that there was no evidence to fix the defendants with a knowledge of the existence of those contracts, and that, moreover, as the conspiracy was alleged to date from the 8th of April, and the written contracts between the prosecutor and his workmen were not entered into until the months of July, August, and September, the alleged object of inducing the men to violate their contracts, was dis-

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(*k*) *Rez v. Turner*, 13 East, 228; as to this case, see *post*.

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proved, and could have had no foundation or existence. He submitted also that any support or assistance rendered to Mr. Perry's workmen, after they had determined to leave his service, would not sustain the indictment, and that there was no evidence that they left in consequence of anything done by the defendants. "The agreement of these parties to go is an agreement which precedes their being brought into contact, either with the defendants, or with any body connected with the defendants in any shape or way. No doubt, when they had made up their minds to go, and did go, the funds of the society were there to assist them; but I should submit that that will not support any count in this indictment, if you should be of opinion that their going away was the result of their own agreement, independently of any act done, or anything said to them by any of the parties connected with such a society. In such case, I apprehend, clearly, the circumstance of their being assisted subsequently by the funds of this society would not maintain a single count in this indictment, because in every count, I believe, there is an allegation that they were caused to go either by inducement, by obstruction, by molestation, by intimidation, or by using unlawful threats; therefore, I apprehend, the prosecutors have failed in that which they were bound to show upon some of the counts: namely, that the object of these parties was not merely to assist persons who had left Mr. Perry, but to induce them to go away; in fact, to get them to go away by inducement of their own, and not from any agreement of the workmen themselves.

* * * It does seem to me to be of great importance for you to see what it is that first causes these men to leave the service: whether they determine amongst themselves to leave the service, or whether it can be fixed on any one of the defendants, that these defendants, or any of them, did seduce these men away in the first instance, as distinguished from their having assisted or countenanced them after they had come to the determination to go away, and after they had gone away. In the one case, I should say, under my Lord's correction, that the act itself is not illegal—assisting them; and if it is not illegal, why, then, in such a case it cannot be illegal to *agree* to assist them; and, certainly, it is a remarkable thing that, with the exception, I think, of one witness, who speaks to Duffield having on one occasion said something about the hired men, there is nothing to fix the other two defendants with a personal knowledge of the circumstance—that witness was Orchard. There is not another witness who fixes either of the defendants with the knowledge of the existence of these agreements; and I apprehend that, even supposing you should be of opinion (although, I should submit, there is no evidence to warrant it) that the object here was to get parties who had entered into contracts, to violate those contracts, which might be an illegal object, I apprehend that the knowledge of the parties that contracts were existing, would be absolutely essential to constitute that a conspiracy. I would call your attention to the fact, that not only has that not been proved, but it is not even averred; there is not an

avermment in this indictment that such a knowledge even existed on the part of these persons."

ERLE, J., in summing up, said, the three defendants stand charged upon this indictment with the crime of conspiracy, and I may say with the learned counsel, if we were to put to you the whole of the twenty counts, of course it would be an endless embarrassment, and I only intend, unless the learned counsel on either side insist otherwise, to divide the counts into four classes, and to put to you the question whether all the four, or any of them, are in your judgment established. I may say, gentlemen, that with respect to the law, relating to combinations of workmen, nothing can be more clearly established in point of law than that workmen are at liberty while they are perfectly free from engagement, and have the option of entering into employ or not, nothing can be more clear than that they have a right to agree among themselves to say we will not go into any employ unless we can get a certain rate of wages. But I think, gentlemen, it would be most dangerous if that proposition were carried at all wider than the terms in which I put it; that is to say: where workmen are perfectly free from engagement, having the option whether they will hire themselves or not, each man for himself may say, "I will go into no employ unless I can get a certain rate of wages," and all of them, if they choose, may say, "We will agree with one another that in our trade, as able-bodied workmen, we will not take employ unless the employers agree to give a certain rate of wages." But, gentlemen, I think it would be most dangerous indeed if that rule of law, so in favour of workmen protecting their own interests, were at all construed to extend to that which is charged upon this indictment, and which the counsel for the prosecution supposes is made out by the evidence, and in respect of which your verdict is to be given; that is to say: to suppose that workmen, who think that a certain rate of wages ought to be obtained, have a right to combine together to induce men, already in the employ of other masters, for the purpose of compelling those masters to raise their wages. The indictment charges in one class of the counts, and that to which I think your attention should be most prominently directed, that they conspired to obstruct Mr. Perry in the carrying out of his business, by persuading and inducing workmen, that had been hired by him, to leave his service in order to force him to change the mode of carrying on his business. There are no threats or intimidations supposed to have been used towards the workmen, but there is a class of counts founded upon that, and I take it to be perfectly clear in point of law, and I lay it down to you for the purpose of your verdict, that if that class of counts is made out you will find the defendants guilty upon that class of counts, that they conspired to obstruct Mr. Perry by persuading his workmen to leave him in order to induce him to make a change in the mode of conducting and carrying on his business. Some of the counts charge that they conspire to obstruct Mr. Perry by this mode; other counts

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charge that they conspired to molest Mr. Perry by this mode ; and I take it for granted that if a manufacturer has got a manufactory, and his capital embarked in it for the purpose of producing articles in that manufactory, if persons conspire together to take away all his workmen, that would necessarily be an obstruction to him that would necessarily be a molesting of him in his manufactory ; therefore, if you find that these counts are established (that is, the first set of counts), you will say they are guilty upon that set of counts. I do not enlarge with you at all upon the rule of law in relation to the offence of conspiracy. It is most obvious, in a word, that if persons, intending to break the law, are compelled to act single-handed, those on the side of the honest part of the community can very well oppose them, and for the most part keep them under, but if those who are determined to break the law combine and co-operate together for that illegal purpose, they are a much more formidable enemy, and the law has said that combination for an illegal purpose is in itself an indictable offence. We are here to look to see whether it is made out that these three defendants, or any two of them, or any one of them, with others unknown, did combine together for an illegal purpose, and that which I have stated to you as the most prominent set of counts upon this indictment would certainly be a conspiracy for an unlawful purpose. Gentlemen, the second class of counts to which I would draw your attention is that with relation to the freedom of the workmen themselves. The workmen have a right to agree that none of those who make the agreement will go into employ unless they are to receive a certain rate of wages ; but with respect to their fellow-workmen they have no right at all to agree to molest, or intimidate, or annoy other workmen in the same line of business, who refuse to enter into the agreement, and who choose to go and work for the employers at a lower rate of wages than that which the parties agree to rely on. There is, therefore, another class of these counts to which your attention is to be directed, which alleges that the defendants did conspire to force the workmen, which were hired by Mr. Perry, to leave his employ by unlawfully molesting the workmen that were so hired. In other cases it is by intimidating the workmen, so hired, by threats. In other counts it is by using threats ; and in other counts it is by intimidating the workmen. I think, gentlemen, that as to that set of counts it will stand very much upon the evidence of Orchard, because it is one thing to persuade and induce by giving money and giving drink, and so on, which is the course that with respect to a great many of the workmen was pursued : that is one thing, and it is a very different thing from threatening a man either with personal injury, or with the loss of comfort in any way, if he chooses to sell and hire himself to another employer. That sort of offence, intended by this class of counts, is very much exemplified by Orchard's evidence. There is no doubt that, if you believe any part of his evidence with respect to the threats, and believe that Duffield there was acting in concert with Woodworth and Gaunt, or any other person, it

would be your duty to say one and all are guilty of this second class, namely, of conspiring together to endeavour by unlawfully molesting, or intimidating, or using threats to the workmen to induce them to leave their employ. That part of the law is intended for the protection of the workmen. Let those without engagements agree to any terms they please, but they have no right to interfere with other workmen who do not come into the agreement and who are, of course, at liberty to go to any employers on any terms they choose. If you think that the evidence of Orchard, or any other witness (I do not remember any other who alleges intimidations and threats to have been used), you will say they are guilty on that class of counts; and if you do not believe Orchard, and there is none other, then you will say they are not guilty upon that class of counts. Then there are two other sets of counts, in respect of which it is not necessary for me to lay down the law on the point suggested by the learned counsel. I am against him on that point of law, but I am now simply taking the verdict of the jury on the counts set down here; and if those counts are founded on a mistaken view of the law, and your verdict should be founded on them, the argument of the learned counsel will be available hereafter in urging that those counts are not founded on any legal right. I believe them to be so, but that is quite immaterial for the purpose of the present inquiry, because I should tell you there are counts that charge that when the workmen had contracted with Mr. Perry to serve him in his trade for certain times, the defendants conspired together to persuade these artificers unlawfully to absent themselves from his service. If you are of opinion it is made out that these men were acting in combination at the time when any workmen were, according to the evidence in your judgment, persuaded to leave Mr. Perry after they had been hired to him, they would be guilty upon that class of counts. The last class of counts is, that they conspired by making the workmen drunk, and, by unlawful means, to induce them to leave Mr. Perry. That is the fourth class of counts, and you will say by your verdict whether all four, or three, or two, or one or none of them are proved.

Mr. Justice Erle then proceeded to read and comment on the material parts of the evidence. In remarking on Mr. Perry's evidence with respect to the deputation of persons who called upon him, and his subsequent refusal to assent to a book of prices, the learned judge said:—From that time in July began the series of acts which are submitted to your consideration, to show that these three defendants conspired either to obstruct Mr. Perry and to make him alter his terms, or to obstruct the workmen by intimidation, so as to make them go, or to make the articulated workmen leave him, or by drunkenness or otherwise to get men in his employ to go away. He gives something of a general outline of that which it is for you to consider, whether it does not show that some plan had been formed after these parties had called upon him to agree to a uniform book of prices. He gives a general outline of the steps

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that were taken that led to this prosecution, and I may tell you, gentlemen, that the essence of the offence is, that the parties combined together to carry out an unlawful purpose; I, for the purpose of the present inquiry, use those terms that the learned counsel for the defendants has insisted on—that they combined together to carry out an unlawful purpose, the essence of the offence is the combination to carry out an unlawful purpose; but although that be the essence of the offence, it does not happen once in a thousand times, when the offence of conspiracy is tried, that anybody comes before the jury to say—"I was present at the time when these parties did conspire together, and when they agreed to carry out their unlawful purposes;" that species of evidence is hardly ever to be adduced before a jury, but the unlawful combination and conspiracy is to be inferred from the conduct of the parties, and if you see several men taking several steps, all tending towards one obvious purpose, and you see them through a continued portion of time, taking steps that lead to an end, why, it is for you to say whether those persons had not combined together to bring about that end, which their conduct so obviously appears adapted to effectuate. Now, after Mr. Perry had refused to agree to these terms, and was resolved to carry on his business as he himself should think right, the first thing that he observed was—"Immediately afterwards I noticed persons perambulating about the premises, and the persons that I noticed were Duffield, Woodworth, Gaunt, and Rowlands." There you have the three defendants, and Rowlands, who appears to be the local secretary of the association for compelling one uniform rate of wages, and you will observe that Duffield, Woodworth, and Gaunt are not persons who were in the employ of Mr. Perry; they had no business at all about the premises. His lordship then proceeded to call the attention of the jury to the consequences perceived by Mr. Perry, namely, the desertion of his workmen, and the pecuniary loss sustained by him:—Therefore, no doubt (said the learned judge) there would be considerable obstruction and molestation, by reason of these men leaving his employ. Did the defendants conspire to induce them to leave? With respect to the evidence of Orchard, he observed:—You will look at the whole, and say if you disbelieve that man; if you do, I think that is the only case of intimidation and threats to the workmen; but if you believe that man, I think, according to his evidence, that set of counts would be made out. In conclusion, Mr. Justice Erle said:—I will repeat to you the four classes under which you may find the defendants guilty if you think they are guilty. Did they conspire to obstruct Mr. Perry by inducing the workmen to leave him for the purpose of making him alter his mode of regulating his manufactory? Did they conspire to molest the workmen by intimidation or threats, so as to make them leave Mr. Perry's employ?—that is the second. Did they conspire to make articulated workmen break their contracts and leave Mr. Perry's employ? Did they conspire by intoxication and other unlawful means to

induce the men that were in Mr. Perry's employ to leave his service? You will say whether they are guilty of the first, second, third and fourth, or any smaller number, or of none, as in your judgment justice may require.

The jury found all the defendants guilty upon the first, third and fourth classes, and not guilty of the second class.

ERLE, J.—You acquit them of that part of the charge that I have described as standing upon the evidence of Orchard?

Foreman of the Jury.—Exactly.

ERLE, J.—I think this will be an intelligible verdict to apportion. The verdict will be—Guilty as to that set of counts which charges the obstruction of Mr. Perry: they are a long way from the first in the indictment, but I thought them most prominent for the jury; the description is enough for that; obstructing Mr. Perry is what the jury have found.

After some discussion, the verdict was entered as follows:—

On the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 12th, 16th, and 19th counts, Not guilty.

On the 9th, 10th, 11th, 13th, 14th, 15th, 17th, 18th, and 20th counts, Guilty.

With respect to the 7th and 8th counts, which alleged the defendants conspired by unlawfully molesting Mr. Perry (in the 7th count), and unlawfully obstructing him and his workmen (in the 8th count) to force the workmen to depart from their hiring, employment and work,

ERLE, J., observed that these counts had better be found for the defendants. They were just half way between the two classes, intimidating the workmen, which the jury had clearly negatived, and conspiring to force the workmen. The counts charge a molesting of Mr. Perry to make the workmen leave, but the molestation of Mr. Perry was the ultimate end the defendants had in view. They would not care a halfpenny about the workmen leaving or staying with Mr. Perry, as long as they could drive Mr. Perry to come to their terms. It was a means to an end,—“We will drive your workmen away, and so compel you to come to our terms, or ruin your manufactory.” These counts might be taken for the defendants.

The 9th and 10th counts were the prominent counts of the first class, which he had left to the jury.

The 9th count alleged that the defendants conspired by molesting Mr. Perry, to force him to make an alteration in the mode of conducting and carrying on his trade. There was no doubt that the jury had found the defendants guilty on that count. So also with respect to

The 10th count, which charged the defendants with conspiring to effect the same object, by obstructing Mr. Perry by inducing and persuading the workmen, in his hiring and employment, to leave their work.

The 11th count alleged a conspiracy to prevent workmen from hiring themselves to Mr. Perry, by molesting and obstructing such

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workmen. The evidence of Mr. Perry and his foreman applied to this,—People were seen coming towards the place, and some of them proposed to come into the employ, but none of them came. There was an advertisement, and then a counter advertisement was put forward, saying, “do not go to Mr. Perry’s, for it is twenty-five or thirty per cent. under the average price.” This also, fell within the first class.

The 13th and following counts had been specifically left to the jury.

The 13th and 17th fell within the third class, conspiring to induce artied workmen to break their contracts.

The 14th, 15th, and 18th comprised the fourth class.

The 16th count alleged intimidation to Mr. Perry. As the defendants abstained from actual violence, or the threat of actual violence, that should be entered not guilty; and the same with respect to the 19th. The last was a general count, alleging that the defendants conspired by divers subtle and illegal acts to force and compel Mr. Perry to raise the rate of wages. That fell within the same class as the 9th and 10th counts.

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES, 1851.

July 29.

(Before Mr. JUSTICE ERLE.)

REG. v. ROWLANDS AND OTHERS. (a)

Conspiracy—Combination among workmen to alter wages—Right of third parties to interfere—Inducing workmen to leave their service—Evidence—Contents of placards—Admissibility of general evidence to rebut presumption of conspiracy—Practice—Right of precedence where separate defences.

1st. *Workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand; and, Semble, other persons, not workmen, may combine with them to assist in*

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

that purpose, but the law is only clear to the extent that the combination is lawful while its purpose is to obtain a benefit for the parties who combine.

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2nd. *Quære*, whether a combination to force a manufacturer to assent to certain wages, or a uniform book of prices, is in itself lawful, but a combination to bring about that purpose by any unlawful means is an indictable offence, whether it be by intimidation or threats to the workmen, or by intimidation or threats to the manufacturer.

3rd. An intention to create alarm in the mind of a manufacturer, and so to force his assent to an alteration in the mode of carrying on his business, is a violation of the law, and supports a charge of conspiring by molesting the manufacturer, to force him to make an alteration in the mode of conducting and carrying on his trade and business.

4th. A conspiracy to obstruct a manufacturer, in order to force him to alter his mode of carrying on his business, by inducing hired workmen to leave their employment by intoxicating them and carrying them off into concealment, is an indictable offence.

5th. *Semble*, a conspiracy to obstruct a manufacturer, and so to force his consent to a book of prices, by persuading and giving money to his workmen, not under contract, to leave their employment, is also indictable.

6th. The contents of a written document are evidence against a person whose name appears in it, and who has assented to its publication.

The contents of a printed placard exhibited in the window of a public house, and purporting to be signed by the secretary, on behalf of an association, held evidence against such secretary, if he saw it in the window, and allowed it to remain there.

So, also, where the placard announced acts done by A. B. and C. D., and they, seeing it, allowed it to remain in the window: held that this was evidence of a recognition by them of the whole contents of the placard.

Proof that the parties signing it and named in it were seen going in and out of the house, and close to the window of the room where the placard was exhibited, is evidence for the jury that they saw it and recognized the publication.

7th. On an indictment for conspiring, by molesting a manufacturer, to force him to make an alteration in the mode of conducting his business, and a part of the charge, and the evidence in support of it, being the inducing hired workmen and apprentices to leave their employment, the following question to a witness, called for the defendants, and who was present at various interviews between the defendants and the workmen, was allowed to be put and answered:—"With reference to hired men and apprentices, what advice did the defendants give to the men?" and also, whether the witness ever heard the defendants use any intimidating language or threats, or recommend force of any kind?

8th. The prosecutor having stated that, in consequence of the desertion of his workmen, he had been forced to procure French artizans, who broke their contracts and went away, held, that he could not be asked how much he had lost by the Frenchmen, the amount of loss by any particular set of labourers being unconnected with the issue to be tried, but otherwise as to the total amount of loss, for the intention to obstruct is in issue, and the result of the operations is a relevant fact as to that. The witness, therefore, might be asked whether, by reason of the work-

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men having left him in the manner described, he had sustained serious pecuniary loss.

9th. In the case of several defendants, who are separately defended by counsel, the right of cross-examination, and of addressing the jury, follows the order of the defendants in the indictment, and not the rank or seniority of the counsel.

THE defendants, Henry Rowlands, William Peel, Frederick Green, Thomas Winters, Thomas Pitt, Charles Pratt, George Duffield, Thomas Woodworth, and John Gaunt were indicted for conspiracy. The indictment contained twenty counts, and was substantially a repetition of the charges contained in the indictment in the preceding case, but alleged to have been committed against other parties, and included the three defendants already tried and convicted upon it.

The 1st count alleged that Richard Perry and George Henry Perry were tin plate manufacturers at Wolverhampton, and employed divers workmen, and that the defendants conspired, by unlawfully molesting the said workmen, to force and endeavour to force them to depart from their employment.

The 2nd count alleged the means used to have been by "unlawfully using threats" to the workmen, and the 3rd count, by "unlawfully intimidating" them.

The 4th count alleged that Joseph Evans and William Hodson were workmen, hired and employed by the prosecutors, and that the defendants conspired, by "unlawfully molesting the said Joseph Evans and William Hodson," to force them to depart from the employment of the prosecutors.

The 5th count charged the means used to be by "unlawfully using threats" to William Hodson, and the 6th count, by "unlawfully intimidating" Thomas Griffiths.

The 7th count charged the conspiracy to be by "unlawfully molesting" the prosecutors, and

The 8th, by "unlawfully obstructing" them.

The 9th count charged the defendants with conspiring, by "molesting" the prosecutors, to force them to make an alteration in the mode of conducting and carrying on their trade and business.

The 10th count was similar to the 9th, but alleged the means used to be by "obstructing" the prosecutors, by inducing the workmen in their employment to leave their work.

The 11th count charged the conspiracy to be by "molesting and obstructing" workmen who were being hired by the prosecutors, to prevent such workmen from hiring themselves to the prosecutors.

The 12th count was similar, but alleged the means used to be by "using threats and intimidation" to the workmen.

The 13th count alleged that artificers had contracted with the prosecutors to serve them as workmen and artificers in their trade for certain periods agreed upon between them, and had entered into the service of the prosecutors, as such manufacturers, and

that the defendants conspired by subtle means and devices to induce and persuade the said artificers unlawfully to absent themselves from the said service without the consent of the prosecutors, and before the terms of their contracts were completed.

The 14th count alleged that William Hodson had contracted with the prosecutors as in the 13th count, and that the defendants conspired by subtle means and devices, and illegal acts and practices, and by intoxicating the said William Hodson, to induce him to absent himself from the service of the prosecutors.

The 15th count charged the same with respect to Thomas Griffiths.

The 16th count charged a conspiracy to intimidate, prejudice, and oppress the prosecutors in their trade, and to prevent their workmen from continuing to work for them.

The 17th count alleged that the defendants conspired by subtle means and devices, and wicked acts and practices, to injure and oppress the prosecutors in their trade, and to induce their workmen to depart before the period of their agreement was completed.

The 18th count charged the defendants with conspiring by subtle means and devices, and by intoxicating, and thereby rendering senseless, the workmen of the prosecutors, to convey them to a distance and carry them away, and thereby to prevent them from continuing to work for the prosecutors.

The 19th count charged a conspiracy to intimidate, prejudice, and oppress the prosecutors in their trade, and to entice and seduce away their workmen, and thereby to injure and oppress the prosecutors in their trade.

The 20th count charged the defendants with conspiring by subtle means and devices, and by illegal acts and practices, and by molesting and rendering intoxicated, the workmen of the prosecutors, and by inducing them to depart from their said employment, and to break their contracts with the prosecutors, to force and compel the prosecutors to alter and thereby increase the amount of wages which the prosecutors were then in the habit of paying to their workmen.

Allen, Serjt., *Huddleston*, and *Rupert Kettle* for the prosecution.

Whateley, Q. C., and *Lawrence* for the defendants *Rowlands*, *Pratt*, and *Pitt*.

Parry (specially retained) and *Macnamara* for *Peel*, *Green*, and *Winters*.

Keating, Q. C., *Skinner*, and *Vaughan* for *Duffield*, *Woodworth*, and *Gaunt*.

Allen, Serjt., stated the case, the main facts of which were identical with those in the preceding case of the *Queen v. Duffield and others*. (b)

The prosecutors of this indictment, Messrs. Richard and George Henry Perry, were tin-plate manufacturers, carrying on business

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on a very extensive scale at Wolverhampton, and up to the spring of last year that trade had been in a very prosperous state; the orders were very extensive; the employment was general, and the rate of wages had been amply remunerative to the men. There were six establishments of this character in Wolverhampton, all acting independently of each other, each master or firm pursuing its own mode of manufacture, and offering to their servants the rate of wages which they considered was sufficient for the purpose, each acting, in fact, independently of the other as to prices; some of the masters being engaged in a smaller way of business than the others, and not having the facilities of manufacture which large manufacturers had. The consequence was that some introduced machinery, by which a portion of the work was prepared; others, without that assistance, required the whole of the manufacture to be completed by hand. This, of course, caused a difference in the rate of wages which was paid by the manufacturers. In the latter case the rate was higher; in the former the wages less in proportion to the assistance received from the machinery. The establishment of Messrs. Perry, if not quite the largest, was one of the largest in the tin-plate trade at Wolverhampton, and they employed machinery, which very much facilitated the work before it came into the hands of the handicraftsman. Up to April, not only had there existed an entire good understanding amongst the workmen of Messrs. Perry, but amongst all the workmen engaged in that trade. On the 2nd of April, however, Messrs. Perry received a letter which created in their minds some astonishment. It announced that there were dissensions amongst their workmen, and that certain delegates, from a society called "The National Society of United Trades," proposed to wait upon them for the purpose of arranging the dissensions which existed between them and their men. Messrs. Perry were very much surprised at receiving such a letter, knowing that there had been no complaint with regard to the employment or the rate of remuneration given. They began to make some inquiries, and they found that, with the exception of one person, the whole of the men in the manufactory seemed to agree with their masters; but one person, of the name of Preston, was observed to go from bench to bench throughout the workshop, and to hold communications with the men relative to some secret matters. Messrs. Perry, conceiving that this man was connected or instructed by the persons who had written the letter, discharged Preston from their employ. Soon after that, certain persons, who represented themselves as delegates from the association referred to, waited upon Messrs. Perry, and said they had come down for the purpose of arranging the differences between them and their men, and they desired to be informed, in the first instance, what was the reason Preston had been discharged. Messrs. Perry informed them that they had exercised their own judgment in discharging him. The delegates then informed Messrs. Perry that, unless they restored that man to his work, they would take every

man out of the manufactory; and further, that they had means of carrying out that object, unless they submitted to a scale of prices which they then proposed. At this moment Messrs. Perry, feeling alarmed, communicated with all their workmen to endeavour to retain their services, and at that time they did not say that they repudiated this proposition. Several interviews took place with the delegates who came down from London, consisting of Peel, a general secretary, and Green, Winters, and others, official paid agents of an association called "The National Association of United Trades." Subsequently the delegates were informed that Messrs. Perry would not submit to be controlled by any association whatever. This was about the month of June or July in the last year, and then a state of things was found to exist which seemed to be in entire accordance with the threats and intimidations previously made by Mr. Green, one of the defendants, and the other delegates from London—that every man would be taken from the manufactory, and that Messrs. Perry would be left without a workman. The first step taken was the publication of a placard, which was exhibited at the "The Star" public house, where the delegates had been stopping, pending these negotiations or threats to which he had alluded. This handbill was headed "20th July, 1850. Special application for an extra levy to the members of the several trade societies connected with the National Association of United Trades by the central committee." [Allen, Serjt., proceeded to read extracts from the handbill, which is inserted subsequently. It contained an avowal that the object was to force the masters to adopt a certain scale of payments, and it proceeded to state what they had done. It then went on to say that if it should be necessary for them to adopt measures of a coercive character to raise the rate of wages of the tin-plate workers of Wolverhampton, and the tinmen should subsequently submit to the terms of the masters, and any depression should fall on them, the society would not support them in that exigency; the converse, of course, being that if they stood out stoutly and resisted their masters to a man they would give the assistance which they were capable of giving from the general society.] The handbill announced what the purpose of these persons was, and it described the means by which it was to be carried out. They in effect said, "We will assist you in leaving your employment, unless they consent to your demand to equalise the wages throughout the trade; that if you leave and stand out, we will assist you with money, or otherwise a levy shall be made amongst the tinmen of Wolverhampton for that purpose; the sacrifice will not be very long, because there is a dissension amongst the masters themselves, and the result will probably be the destruction of the trade of Messrs. Perry, which will be a very happy circumstance indeed." Very shortly after the propagation of that handbill, a meeting was held at another manufactory, the Old Hall, at which a levy was agreed upon to the extent of 4s. a week per man from those in work. Certain officers were elected. Those officers were called members of the Secret

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Committee, being workmen of another manufactory, having no connexion with Messrs. Perry, and having no right whatever to interfere in the matter. These persons, thus appointed, proceeded to certain acts in accordance with the express intentions of the bill to which he had alluded. From that moment Messrs. Perrys' manufactory was never free from watchmen, composed of members of the Secret Committee and others, who watched all the workmen that went in and out of the manufactory, and addressed them; and from that time the men began to disappear in batches. Messrs. Perry, who had been in the habit of employing from fifty to one hundred hands amongst the tin-plate workers alone, had only, at the end of July, two men in their establishment. Their entire trade was put a stop to, and not only so, but the japan trade connected with it. In this difficulty Messrs. Perry sent to France, and Frenchmen and Germans were brought over at great expense to execute the orders which Messrs. Perry had received; but no sooner had they been put to work than they were despatched to different parts of the kingdom, and some of the defendants actually accompanied them. Many of the workmen were given drink and became intoxicated, and they were carried to different parts of the kingdom, and liberally supplied with funds in the first instance, but they ultimately became vagrants and wanderers, and found their way back to their old masters, and most of them were now in Messrs. Perrys' employ. Although these men would be, perhaps, unwilling witnesses, it would be proved beyond all doubt that their abduction was the consequence of the conspiracy in which Peel and the other delegates from London were concerned. In addition to what had been stated, language had been uttered at a public meeting held at the theatre in Wolverhampton on the subject, at which most of the defendants were present. The speakers, in fact, avowed that they had used coercive measures, stated that all negotiation with Messrs. Perry had failed, and called for additional funds to complete the scheme. It would, moreover, be found that, subsequently to the return of the poor men to Wolverhampton, declarations were made by many, if not all, the defendants, clearly showing what their original intention was, and that coercion, threats, and obstruction had been used to the men. The jury would see that if there was no law to protect individuals in such a difficulty as that in which Messrs. Perry had been placed, the result must not only be injurious to individuals, but prove a national mischief. The effect would be to drive the trade to other countries. Messrs. Perry therefore considered that they were not only asking for themselves the protection of the law, but that they were claiming on behalf of their trade and of all the trades in this kingdom, the undoubted right which every master possessed, to conduct his own business in his own way, to offer what wages he chose, and to regulate his concerns without foreign interference.

Mr. George Henry Perry, manufacturer of japan and tin-plate wares at Wolverhampton, and carrying on business with his father,

Mr. Richard Perry, under the firm of Richard Perry and Son, was the first witness examined. He proved that, in the spring of 1850, the firm had a number of orders on hand, and employed about one hundred and twenty men, who received good wages, varying from twenty-five to fifty shillings a week. In November, 1849, Thomas Preston, a workman, had been discharged. About the middle of December following, the defendant Green came into the counting-house, and stated that he was a member of the National Association of United Trades, of which Thomas Duncombe, Esq., a Member of Parliament, was president; that they had twenty thousand pounds at their command, and that nearly the entire working population was co-operating with them. He wanted to know the reason why Preston was discharged, and whether it was not because he belonged to the Tin-Plate Workers' Society. He said, if that was so, they should take all the men out of the manufactory, and stop the supplies, so that not a man should call to get a situation. Witness assured him that Preston was discharged because his services were not wanted, and told Green that he had better mind his own business, and not come meddling and interfering with theirs. He then left. In April, 1850, witness received a letter, dated the 2nd of April, 1850, signed "William Peel, Secretary," and bearing the seal of the "National Association of United Trades for the employment of Labour, No. 11, Tottenham Court Road, London." Witness's brother, Edward Perry, showed him a similar letter received at the same time. [The letter was then read. It stated that a deputation of the National Association, in conjunction with certain representatives of the tin plate-workers of Wolverhampton, proposed waiting on Messrs. Perry on the 8th of April. The letter has been given in the preceding case. (c)] No persons called on the 8th of April, but, some days after, Green called. He said that he was a delegate from the National Association, and that he and Mr. Peel had come down to settle the differences between the Messrs. Perry and their men. Witness said he was not aware of the existence of any differences. Green said he wished a book of prices to be adopted, which the men had been writing out, and a copy of which the witness had previously received. Witness said he had not had an opportunity of looking at it, but would do so some day at his leisure. After the lapse of a week or fortnight Green came again, and urged the adoption of the book of prices, and said that if the firm did not, all the men should be taken out. Having orders on hand, and wishing to gain time to get other hands, witness did not give a decided answer, but said he would consider of it. Subsequent interviews and meetings followed, at which the defendants Green and Peel were present, together with some employers and workmen. At the last interview, about the middle of June, no arrangement having been effected, Messrs. Perry announced their determination to carry on their business as

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they had theretofore done. Witness soon observed a change in their establishment. Shop meetings were frequently held; the men did very little work, and the boys still less. Several men left in July, who were not under written contracts, to the number of about twelve. At that time there were fourteen or fifteen men under written contracts; some of these contracts were of long standing. In the course of August, September, and October, these men left their work; among them were Hodson, Evans, and Griffiths. During all this period, namely, between June and October, witness repeatedly saw the defendants Green, Duffield, Woodworth, Gaunt, and Rowlands about the factory and speaking to the workmen. He also saw Peel and Winters occasionally. They came at all times of the day, but most frequently a little before the time of the men leaving work for dinner, and before they left their work in the evening. All the workmen who were observed to be spoken to by the defendants, left their employment about that time or soon after. At the latter end of October there was scarcely a man left in the manufactory. Witness went to Paris, and there engaged eight workmen, seven Frenchmen and one Pole, and brought them over to England. In the afternoon of the first day after their arrival at Wolverhampton, witness missed several of the Frenchmen, and went in search of them to the Garrick's Head, a resort for tin-plate workers. He there found the defendants Duffield and Woodworth, and one of the Frenchmen, who was very drunk. There was also a person in the room who appeared to be a foreigner, but not one of the witness's men. Witness took hold of the drunken man's arm, and led him out. Duffield spoke to the strange foreigner, and said "Follow them, go alongside of them; hear what they have got to say; they cannot hurt you." He followed witness into the street, but, upon Mr. Edward Perry coming up, he turned away. The foreign workmen remained until Christmas, but they did very little work, and then left without notice. Duffield and Woodworth were repeatedly speaking to them. Witness went a second time to Paris, and brought back eleven other workmen, six of whom went to Mr. Edward Perry's, and the others to witness and his father's. These men left in the same way as their predecessors, without notice or consent. A number of apprentices also left without leave or notice. The witness having been asked how much the firm lost by these Frenchmen, *Parry* objected that it would not be evidence.

ERLE, J.—I do not exactly see the relevancy of it. The issue to be tried is, whether these men conspired. The amount of loss by any particular set of labourers is clearly unconnected with that issue.

Huddleston observed, that evidence of loss was given in the previous case. (d) [ERLE, J.—That was the sum total of loss; the very issue in the matter is the intention to obstruct in business; and, of course, the result of the operations is a relevant fact as to that.] He then said he would put the question presently in that way.

The witness having given some further evidence as to the desertion of men, and having stated that, at the end of October, the number of journeymen were reduced from about thirty to two or three, in consequence of their leaving without notice; the following question was asked by

Huddleston.—Have you made any estimate of the amount of loss?

Parry, objected to that question.

ERLE, J.—In this way it is evidence. You see it is charged that they conspired to induce workmen to obstruct Mr. Perry in the carrying on of his business by inducing workmen to leave so as to force him to make an alteration in his business. It seems to me to be very relevant. I anticipate, perhaps, your objection. It seems to me very relevant to the inquiry whether they conspired to obstruct him in his business, to ask whether he was obstructed. There might, no doubt, be more cogent proof.

Parry.—That he was obstructed in carrying on his business might appear, not from any pecuniary loss he sustained, but rather from the fact that he could not execute his orders, and so on. I apprehend that that might be relevant; but the exact loss which he sustained, I submit to your lordship, cannot be relevant here, and for this reason, there is no count in this indictment such as has sometimes come under your lordship's notice, charging an intention to impoverish these gentlemen.

ERLE, J.—Take the instance of a brickmaker's business, which goes on for half the year; and suppose there is evidence that, towards the setting in of the wet season, people conspire together to get all his workmen to leave. If by what you do he gets rid of the men for the winter, you have helped him on.

Parry.—Is not that an inference, rather than a fact, my lord?

ERLE, J.—No. It is a very cogent fact in answer to such a case, that these men have left in the wet season. The question would be, "What loss was it?" The answer, "None whatever, but a benefit."

Parry requested his lordship to make a note of the objection.

ERLE, J.—If I take a note of it, I must have it argued and decided in case my view should not be the correct one.

Parry.—It appears to me, with great submission, that this is not a fact in the case to be proved. It may be an inference to be drawn from the other facts of the case. The reason why I object to it is this—I have not confidence that this gentleman may not very much exaggerate a fact of this kind, and I have no means of testing him or of contradicting him.

ERLE, J.—To this extent the question is relevant. "By reason of the workmen having left you in the manner you have described, did you, in your opinion, sustain serious pecuniary loss?"

Parry.—I should object to that if my learned friend puts it in that way.

Huddleston.—It is alleged in each count "to the great damage of the prosecutor."

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ERLE, J., was about to put the question to the witness in the above form, when the counsel for the prosecution withdrew it.

The witness was then cross-examined by *Whateley*, Q. C., on behalf of Rowlands, Pratt, and Pitt; and afterwards

Keating, Q. C., rose for the purpose of cross-examining the witness, on behalf of Duffield, Woodworth, and Grant, when

Parry interposed, and said he appeared for Peel, the second defendant on the indictment, and he believed he had a right to cross-examine the witness before his learned friend.

ERLE, J.—I have heard of that rule of practice.

Parry.—It was so decided in the case of *The Queen v. Barber*.

Keating.—My learned friend, Mr. Greaves, for whose authority I entertain a very high respect, says that it was so decided in *Barber and Fletcher's case*.

ERLE, J.—And long before that, I remember its being claimed in the Queen's Bench over me, by a junior to me who preceded me in the defence, because his client was earlier named in the indictment.

Greaves, Q. C. (*amicus curiæ*)—I insisted on it in *Barber and Fletcher's case*.

ERLE, J.—I remember, in the time of Lord Tenterden, having the matter decided against me.

Parry then proceeded with the cross-examination of the witness, followed by *Keating*.

Mr. Edward Perry, in his examination, gave the following amongst other evidence:—Peel and Green were in Wolverhampton in the month of July, 1850. Winters was not to my knowledge. Green and Peel lodged at the Star beerhouse when they were in Wolverhampton, and witness lodged there also when he was there. I have seen Duffield, Woodworth, Grant, and Rowlands there also. I know the Swan beerhouse. The defendants Duffield, Grant, Pitt, Rowlands, and Woodworth were there, I believe, during the strike almost daily. I have not seen Green and Peel at the Swan. I have seen them at the Swan. I have seen them at the Star, where they lodged; and I think I saw Green at the Swan once. [*Rupert Kettle* here put a handbill into the witness's hand.] I saw this placard in the window of the Star. I saw it there during the strike. I saw a similar paper to this in the Star window, in the month of July last, and I think it remained there several weeks. I also saw a similar bill in the window of the Swan beerhouse.

R. Kettle now proposed to have the handbill read.

Whateley, Q. C., submitted that it could not be read. He only appeared as far as this was concerned, for Rowlands and Pitt, and the witness said that he had seen Rowlands at the Star, and that he had seen both Rowlands and Pitt at the Star and the Swan during the strike, and that that placard was in the window. How could that implicate Rowlands and Pitt?

ERLE, J., inquired what the counsel for the prosecution said to that?

Allen, Serjt.—At present the evidence is offered as against those defendants who were seen to reside in the house at that time.

Whateley supposed the evidence was intended to be taken in connexion with the questions put to the witness, because, first of all, he is asked whether Rowlands and Pitt were there, and then he is asked, “was the placard in the window?” He assumed, therefore, that it was for the purpose of showing that they either ordered or sanctioned the contents of that document. Would his learned friend say he did not offer it against Rowlands and Pitt?

ERLE, J.—If it is evidence against any one of the defendants it is admissible, and it must be read. [The document was handed to the judge, who, after looking at it said,] I am inclined to think it is evidence as to Rowlands, but I will hear Mr. Parry as the name of Mr. Peel was in the window of the house in which he lodged, and, according to this witness, where he was in July during the time it was in the window, and it purports to speak in the name of Peel. All I should do is to admit it in evidence.

Parry requested his lordship to take a note that he objected to it.

Allen, Serjt.—We will take it as against Peel at present.

ERLE, J.—I believe it is admissible against those in respect of whom I draw the inference that they saw it in the window, those in respect of whom this handbill announces any intention. Green and Winters are the two that are named. It purports to be an instrument by Peel, and I think there is evidence before me from which I am of opinion it is probable that Peel had seen that instrument, and it is probable, by his not objecting to it, that he permitted his name to be used to that instrument.

Parry said he would not argue the point, but would simply request his lordship to take a note of it.

ERLE, J.—I am clear that it is evidence as against one of the defendants, it being published in his name, and, according to the testimony of this witness, being probably seen by him.

Parry.—It is never brought in any way to his notice. It is mere general evidence.

ERLE, J.—If the jury are of opinion that he saw it and sanctioned its being there, of course it is good evidence.

[The document was about to be read by the associate, when Mr. Justice Erle put some further questions to the witness.]

ERLE, J.—You say that was in the window in July? Witness: Yes.

During the time that you saw Peel at intervals at the house? Yes.

Are you of opinion that Peel must have seen that paper? Going in and out of the house, he could not help it.

ERLE, J.—In writing down my ground for receiving the document, I say there is evidence for the jury to the above effect.

Parry said he hardly understood the nature of the last question, and if it had been put by the counsel for the prosecution he should have objected to it.

ERLE, J.—Was it in such a situation that a man, constantly

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coming in and out, must have seen it? (to the witness.) Did you see Peel in the house in July? Witness: I did.

Was the bill in such a situation that a man, going in and out as you saw Peel going in and out, must have seen it? He must have seen it. It was as visible as it is now to me at this distance.

You could not read it at that distance? I could not read it at that distance, but I could see the heading of it.

Parry.—I do not understand that your lordship has it on your note that he saw Peel constantly going in and out. He says he saw him at the Star, and that he might have seen this handbill in July.

ERLE, J., read his note of the evidence as follows:—"Peel and Green were in Wolverhampton in the month of July, I think. I am certain Peel and Green were there in July; Winters not to my knowledge. I know the Star beerhouse. Green and Peel lodged there, and Winters, also, when in Wolverhampton. I have seen Duffield there, and other people, at the Star. I have seen this placard in the window of the Star during the strike. I saw it in the window during the month of July, and during several weeks. I saw a similar bill at the Swan in the window. The bill was in the window in July during the time that I saw Peel there. Peel went in and out of the house while the bill was in the window. I think he could not go in and out of that house without seeing that bill in the window."

ERLE, J. (to the witness)—Did Green go in and out of the Star while the bill was in the window? Witness: Yes.

I think you say, you did not see Winters there at that time? I did not.

ERLE, J.—Nobody else is mentioned in the bill but Peel, Green, and Winters.

Parry, requesting permission to put some questions to the witness before the document was read, it was agreed that the reading should be postponed until the end of the witness's examination.

ERLE, J.—Then at present I take this evidence:—"The bill was in the window while Peel was there. Peel went in and out while the bill was in the window. Green went in and out of the Star while the bill was in the window. I think a man going in and out, as Peel and Green did, must have seen the bill."

Parry.—That will be the evidence, and subject to my altering it on cross-examination.

The witness was then cross-examined by *Whateley*. On cross-examination by *Parry*, with reference to the placard, he said:—"I read the bill I saw in the window of the Star. I read it in the window. My attention was attracted to the window by seeing several people round it, reading it. I waited until they had gone away, and then I went and read it myself. The bill I have here to-day was brought by Mr. Underhill (the attorney for the prosecution.) On my oath I saw Peel go in and out of the Star in the month of July, 1850. I believe I saw him twice or three

times; twice, at least. I saw Green also. I saw him while I was reading the bill. There was a little blind down, and I saw him through the crevice. I will not swear that I saw Green at the Star more than once; that was just as I had finished reading the bill. This bill, or a bill like it, was posted at the window, so that persons outside could read it."

At the close of the examination of the witness, the document was read, Parry still objecting to its reception.

The placard was as follows:

"Special application for an extra levy. To the members of the several trade societies connected with the National Association of United Trades, by the Central Committee.

"**FELLOW WORKMEN.**—Your committee have been called upon by the tin-plate workers of Wolverhampton for their advice and assistance, to enable them to obtain from their employers an established book of prices for the town, to which both employers and employed should be required to conform. To this request your committee gave immediate attention, and deputed one of their members to inquire into the particulars of the case, and to render such assistance as might appear to him and to the Central Committee, upon his report, requisite in the case. From the report furnished by their colleague, the Central Committee found that the tin-plate workers of Wolverhampton numbered about 300 men, now employed by six principal manufacturers, and that these employers were paying for their labour prices varying from ten to fifty per cent. from each other, and that the men were divided in nearly equal proportions between the highest and lowest paying shops. The Central Committee advised that a committee of the men should be empowered to frame a book of prices, based upon the principle of a fair and equitable remuneration for their labour, and that a fair copy of such book should be presented to each of the employers, for their consideration and approval.

"Upon the completion of this book, copies were presented to each employer by a deputation, accompanied by Mr. Green, a member of the Central Committee, and a period of two or three weeks was required and allowed, to afford an opportunity for its examination. At the expiration of this period the several employers were again visited, each by a deputation (consisting of Messrs. Green and Peel) of this committee, together with two of their own workmen and the trade secretary.

"A further delay was (for various reasons assigned) required and submitted to, when, at length, after much trouble and several protracted interviews, a qualified assent was given by two firms, at both of which, indeed, the prices asked have been paid some time; a third expressed a willingness to accept the book if the others did, but the three others absolutely declined to accept the proposed book, even as a basis upon which to negotiate for the formation of another.

"In these preliminary attempts to arrange this matter for the

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mutual advantage of both parties concerned, much time was expended, and a large outlay incurred both by the men and by the Association.

"Your committee were still unwilling to withdraw from the negotiation, and additional interviews were obtained with the three employers, Mr. E. Perry, R. Perry and Son, and Mr. Fearncombe, to induce them to consent to a conference of masters and men, with a view of trying to bring this subject to a satisfactory conclusion. After repeated interviews and much argument, your committee succeeded in inducing the two employers, E. Perry and R. Perry and Son, to make arrangements for the proposed conference, which it was agreed should take place the week after Whitsuntide, and to consist of those employers who chose to attend, one man from each shop, and Messrs. Green and Peel, as mediators, on the part of the men. A still further delay of a week took place in deciding upon preliminaries, and, on the 3rd of June, the first meeting took place, and was attended by four employers; Messrs. Shoolbred and Loveridge, and Mr. Walton, having already given their assent to the book, declined any further proceedings in the matter. Upon this day no progress could be made, in consequence of a dispute arising between Mr. E. Perry and one of the delegates. The conference was abruptly adjourned until the following day. Upon its reassembling, the impossibility of bringing such conflicting elements to unite, was soon made manifest.

"Prices were proposed by Mr. E. Perry, which would have placed the men in a worse position than they are at present.

"Any book established upon Mr. E. Perry's proposition would have amounted to a reduction of thirty per cent. to one-half of the tin-plate workers in the town, 150 of whom are members of the National Association. Such a proposition, therefore, was quite inadmissible, and the conference was adjourned *sine die*.

"In this position your committee were applied to by the committee of the tin-plate workers, to support them in an attempt to force the original book upon the non-conforming employers, and that the association should support those who were members of the National Association, ninety-nine in number, or such of them as it might be necessary to take out, and that the trade should support those who were not members of the National Association.

"Your committee, considering this case as one for an advance of wages, did not consider itself warranted in pledging the association without the sanction of the members. They therefore submitted to the tin-plate workers' committee the following propositions:—

"1st. That the deputation from the Central Committee proceed to Wolverhampton on Monday, the 1st of July.

"2nd. That the deputation be instructed to re-open negotiations with the men and their employers for a modified list of prices, upon a basis of the average of the prices now paid by Messrs. Shoolbred, Walton, E. Perry, and R. Perry.

"3rd. That this committee draw up a memorial to the trades, explanatory of the case of the tin-plate workers, calling for their consent to such a levy as may be necessary to enable them to accomplish their objects in behalf of the tin-plate workers, in the event of their renewed attempts to settle the case by mediation failing.

"4th. But should the attempts to settle this by mediation fail, and any arrangements beneficial to the men be gained by ulterior measures of a more coercive character, this committee beg it to be distinctly understood, that in the event of a depression, or through a relaxation in the organization of their trade, the employers attempt to reduce them to their present prices, this committee shall not be called upon to defend their position by pecuniary assistance.

"In conformity with the above resolutions, Messrs. Green and Winters have again visited the employers, and, up to this period, have not succeeded in inducing them to agree to the reasonable propositions of the men. Indeed, the conduct of the employers through this transaction has been marked by much harshness and unfairness, while the men, on the contrary, have shown every disposition to conciliate, and to accept any reasonable terms which would put an end to their present anomalous position.

"The Central Committee have a strong desire to obtain justice, or even an instalment of justice, for the tin-plate workers, inasmuch as they have been amongst the staunchest supporters of this Association, and having thus always shown a readiness to support the rights of others, they conceive they have a powerful claim upon your support when their own rights are invaded by a powerful and unholy confederacy of a clique of their employers. Your committee are powerfully impressed that when it becomes known that the just and reasonable claims of the tin-plate workers will be backed by the united and continuous support of the National Association, that the struggle will be short, that Messrs. R. and E. Perry, with all their wealth and influence, will not like to see their business passing away to their neighbours, or to other towns, who will be quite ready to receive it. Neither the men nor your committee can be charged with precipitancy, or of having made any unreasonable demands.

"It appears monstrous that two highly respectable gentlemen should be able to pay, for a long series of years, a scale of prices upwards of thirty per cent. higher than E. Perry and Co.; that they should take their goods to the same market, and should, under such apparent disadvantages, be gradually increasing their business, and, if report may be credited, realizing a handsome profit.

"The Central Committee conceive it to be their duty at once to make an appeal to the trades in connexion with the Association to arm them with the pecuniary power to rescue these men from a system of dishonest and merciless exactions by a confederacy of avaricious capitalists. This is a case in which every offer which reason and justice could dictate has been insultingly rejected; all

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conciliatory measures have failed; it becomes the duty of this committee to show the unprincipled confederacy that the National Association are pledged in a bond of brotherhood to protect each other against their unholy machinations.

"Already has Mr. E. Perry given evidence of the very questionable means he is prepared to adopt to force compliance with his extortionate demands.

"One man who had declined taking out a job at the price dictated by Mr. Perry, which was considerably less than was being paid for the same article in the town, became at once marked for the especial vengeance of his ruthless employer: producing a list of the persons receiving parochial assistance from the parish of Wolverhampton, he singled out a name. 'Is not this your father?' being answered in the affirmative, 'Then I'll take care to represent to the Board of Guardians that he is no longer a fit recipient of parochial assistance, that he has a son capable, if he chooses, of supporting him, and if he is too idle to work to support his father, we'll try the virtue of Stafford gaol.' These, fellow working men, are the weapons which this gentleman is mean enough to employ for the protection of those gains which he unfairly extorts from his workpeople. The Central Committee therefore put it to you,—Is not this a case in which the power and utility of the National Association should be tested? Is it to be endured, that this Perry and his confreres are thus to be permitted to trample upon the rights of labour? Is it after this fashion that the powers entrusted to parochial dignitaries should be exercised, in enabling them more effectually to rob the labourer of his reward? Will you not unanimously and promptly fly to the rescue of your oppressed fellow-men, and give these dishonourable employers one striking proof of the 'power of the pence.'

"The Central Committee request that, immediately upon the receipt of this appeal, the secretary of each body will take the most prompt steps to call a general meeting of the society he represents, that the call of the Central Committee for a weekly levy of sixpence in the pound will be granted on behalf of the tin-plate workers of Wolverhampton. It is not anticipated that this levy will be required for any long period, probably not more than a month; the state of the tin trade, the division among the employers, one-half of them employing half the men have conceded their moderate requirements, are circumstances which will prevent the possibility of a lengthened struggle. One of the most fortunate results would be, that Mr. E. Perry should carry his threats into execution, to shut up his factory, and withdraw his capital from the trade, which he would thus leave to more equitable and conscientious successors. It would be a happy occurrence for the tin-plate workers of Wolverhampton.

"The Central Committee cannot doubt that a prompt and unanimous response will be given to this appeal, to the justice and humanity of the members of the National Association.

"If this Association is not prepared or capable of protecting its

members from being thus plundered of the fair fruits of their industry, then indeed it is a useless experiment, and instead of being a shield and panoply against the oppressors' wrongs, would be better designated as 'a delusion, a mockery and a snare.' The unfrequency of a demand for any extra contribution from the members of this Association is a powerful proof of its general efficiency, and will, it is hoped, induce them cheerfully to comply with the present demand.

"The Central Committee feel that they have performed their duty, and now leave the case of the tin-plate workers to the justice and spirit of the members, at the same time not concealing from them the fact that the character and honour of this movement is deeply implicated in the result; that a prompt action will ensure success, and strengthen the Association in an incalculable degree, while a failure must tend to weaken, disorganize, and perhaps destroy it altogether.

"The secretaries are therefore requested to lose no time in giving effect to the measures of the Central Committee, and to remember that this levy, to be of use, must be sent up regularly every week during its continuance, which the Central Committee will use every endeavour to make of short duration.

"A deep and important responsibility now rests upon the members of the Association, thousands are watching their proceedings, whose adhesion is contingent upon the success or failure of this case. A due consideration therefore for your interests, in strengthening an institution which you have yourselves reared for your mutual protection, should prompt you to the performance of a duty which each expects will not be withheld when invoked in his own behalf; justice, humanity, and self-preservation are the powerful incentives which unite you to action, and before these all mere mercenary influences should be made to succumb.

"A long pull, a strong pull, and a pull altogether, and victory is yours.

"On behalf of the Central Committee,

"WILLIAM PEEL, *Gen. Sec.*"

A variety of other evidence was adduced on the part of the prosecution, of the nature of that in the preceding case of *Reg. v. Duffield and others*, and supporting the case opened by Allen, Serjt.

The evidence tending to implicate the defendants Rowlands and Winters, in addition to the facts already mentioned in the evidence of the prosecutor and his brother, was as follows:—

Duncan McNaughton, in the service of Mr. Edward Perry, stated that Rowlands and Winters were present, with other defendants, at a meeting held in the theatre at Wolverhampton, in October. The defendant Peel addressed the meeting, and gave an account of his having waited upon the masters in Wolverhampton. He said that the negotiations had failed, but that it was of little consequence, as the masters might depend that

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eventually they would have to pay the prices asked from them. He said that he was there to advocate an organization amongst the tin-plate workers and other trades, and he recommended their joining the Association of United Trades, of which he was the secretary. The defendant Green also spoke and said, that having exhausted all their other plans, they were obliged to revert to their ulterior means; but he did not add what those means were. He also said that the tin-plate workers had drawn out a book of prices at the expense of nearly 100*l.*; that it had been presented to the masters, and that the workmen said, as they had a perfect right to say, "This is the price we will have for our labour," and that the Association said to the workmen, "That is the price you shall receive for your labour, and we are prepared to support you at 12*s.* 6*d.* a week until you get that price from other masters, who will want workmen as they will get the orders." On cross-examination, the witness stated that the meeting was public, and there were a great many persons present, the theatre being nearly full. A master manufacturer in the japan trade was in the chair. The witness said that he was himself a member of the National Trades Association, and almost every tinman was, as a matter of course.

John Shenton, a tin-plate worker in the employment of the prosecutors, who left when the strike took place, said, that during the thirteen weeks he was out he received 12*s.* 6*d.* a week. The first sum, for half a week, he received at the Red Cow public-house; some person counted the money out, and Rowlands pushed it across the table to the witness. The witness also said, that the reason why he left his work was because Rowlands, the secretary of the society, ordered him to do so if the masters would not give the book prices. On cross-examination, he said that, going one night from work, he met Rowlands, and told him, "I have partly finished my work, what I am to do." He replied, "Why, if you do not receive the book prices, you must come away." Witness said, "How shall I know whether I have the book prices?" and he replied, "You must come down to me, and then I will tell you."

Edward Robinson, another tin-plate worker who had struck, and received 12*s.* 6*d.* a week from the society, said he was sometimes paid by the defendant Green, and sometimes by Winters.

Evidence was also given, showing Rowlands and Winters in the company of the other defendants at various periods, but not when any act was done tending to implicate those other defendants.

Whateley, Q. C., having submitted that there was not sufficient evidence against Thomas Pitt, and the counsel for the prosecution assenting, addressed the jury for Rowlands and Pratt. After referring to the statute 6 Geo. 4, c. 129, he read to the jury some observations of Lord Cranworth (then Mr. Baron Rolfe) in a case against O'Connor, tried before him at Lancaster. That learned judge said, "Persons may meet together for the purpose of determining that they shall not work under twenty shillings a week,

and those of them who cannot get that must be out of work. Just in the same way masters may meet together and say, we will not give more wages than so and so, and if we cannot get workmen at that price, we must be content to do without them and let the work stop." * * * * "That is the law. Everybody is perfectly free to bring his capital into the market on such terms as he may think fit; and, on the other hand, every one has a right to bring his labour into the market on such terms as he may think fit; and, provided there is no interference with the free will of others. The law in doing that, has done all it can do—all that it ought to do. That being the law, this fifth count charges the defendants with having endeavoured to persuade certain workmen engaged in the factories to confederate and leave their employment, and produce a cessation of labour in a large portion of the realm, with intent thereby to bring about a change in the laws and constitution. Now the doubt that has existed on this subject is this: It being lawful for persons to meet together where no violence is practised, and determine not to work except on certain terms, can it then be illegal for others to combine together to persuade them to do so?"^(e) *Whateley* then proceeded to argue that question in the negative to the jury. The workmen in the present case might have said, "There was formerly a book of prices, which regulated the wages between master and servant; it was found to be just between man and man, and we will now say we will not work, nor will any of us go into that manufactory until such a book has been again established to regulate our proceedings." If that were so, where is the law that says you must not advise other men not to work who are in the manufactory upon those terms? Supposing in a manufactory, disputes or differences had arisen with regard to there not being a book of this sort, and that the workmen should go and say to a fellow-workman, or to a society of workmen (for it is the same thing), "We wish you to advise us: ought we or ought we not to continue to work unless the master will consent to this, which we think a reasonable thing?" Surely an individual may say, "I will tell you what my advice is, although you, even yourself, may be well off at the present moment, and satisfied with regard to your wages, I tell you that, in my opinion, the interests of the whole of our trade is so much interested in having that book again established, that I advise you not to work any longer unless the master will comply with that regulation." There is no law in England to punish a man for giving that advice, nor is there any law that, if the workman does not break any engagement into which he enters, can prevent him from leaving if he chooses. Take the case further; suppose, as is the case at Wolverhampton, and in almost every manufacturing town in England, there are associations of workmen for their common benefit; some of them being clubs and some of them with lodges of different kinds; some

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(e) *Reg. v. O'Connor*. Lancaster Assizes. *Whateley* cited from a printed report of the trial, alleged to be copied from a shorthand writer's notes.—[J. E. D.]

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of them where there are houses of call, and all these are established for the purpose, among other things, of obtaining a sort of general knowledge of what is going on in the trade. They may have some evils attending them, but they are beneficial in many respects. They are beneficial to assist a man who is out of labour; they are beneficial in laying down laws that ought to regulate the whole of their trade, and there is no rule of morality, nor any rule of law that can be interposed, to show that those men have not a full right to meet in any way they please, and to lay down laws (if those laws are not contrary to the laws of the realm) for the regulation of their own trade and business.

Whateley subsequently observed that any one of the jury who had taken a great interest in any young man who was at work, and who thought his master was not giving him sufficient wages, might say "Come away, if your master will not give you the fair price according to the list of prices; come to me till you get work, and I will give you half-a-crown, or something to support you," without committing a crime.

ERLE, J.—If I entice away your servant, is not that actionable?

Whateley.—The case I put to the jury is this. The witness Shelton who was working by piece-work, and was not a hired servant nor an apprentice, nor serving under an agreement, went to the defendant Rowlands, and said, "If I do not receive the book price, what can I do?" Why leave; that is the advice which is asked and given, and was it not justified? Suppose a man says, "My master is paying me less than the ordinary wages of the trade, and I am working piece-work, what would you advise me to do?" "Finish your work and leave his service," that is my advice. I say, with due submission to his lordship, and subject to his correction, that there is no law that would, or ought to, punish a man under such circumstances.

ERLE, J.—The proposition you put was this, that any man who thought a servant was not properly paid by his master, might say, "Leave your work and come away, and I will support you until you get proper wages." Would not that give the master an action upon the case?

Whateley.—I was applying my mind to the evidence of Shelton. What I intended to say was this: that supposing Shelton had a communication with Rowlands as to what course he should take, if his master did not pay him according to the book prices, and Rowlands had said, "I advise you to leave your work," and he left it and was supported by Rowlands with money after that time, he would have been not only not amenable to any law, but would not have been amenable to any rule of morality upon the subject. With regard to the point asked by his lordship, whether it would not be the subject of an action upon the case for enticing away the servant? it is certainly not indictable, and has been so held. If a man went to the servant of another, and without any application from the servant for advice, said to him, "I advise you to leave your work," the servant being satisfied and willing to stay, the

party inducing him to go away might be subject to an action upon the case for damages for enticing away the servant; but even that would not be indictable, and I believe it has never yet been decided, although it has sometimes been said that if a course of proceeding is not indictable in an individual, it is indictable if ten persons join in doing the act or giving the advice. It would not be a conspiracy in law—it would not render a man liable to any criminal proceeding. And is it not just and right that the law should be so? Do we not all in this world depend very much on the opinion of others? Very few men think for themselves—very few men are capable of it. What is so common as for men to go and consult others; aye, and a body of men; and to say, “Here I am in a strait, what would you advise me to do?” And if the answer is, “We will advise you what to do, and we will give you the means of carrying our advice into effect;” that is not punishable by the law of England.

Parry, for the defendants *Peel*, *Green* and *Winters*, submitted that there was no evidence to go to the jury against *Winters*. All the evidence with regard to his own individual conduct was, that he was present at the meeting of the 22nd of October, at the theatre. He appeared to have taken no part in that meeting; and two of the witnesses (two of the young men who were called, *Shelton* and *Robinson*) said that *Green* and *Winters* paid them 12s. 6d. while they were out of work.

ERLE, J.—I will tell you what I propose to do with respect to them. I have looked over the notes, and there seems to be—I will not say a uniform, but nearly a uniform line of evidence in my mind against *Duffield*, and *Grant*, and *Woodnorth*, and *Green*, and *Pratt*. With respect to *Peel*, it is evidence of a peculiar description not in the same class with them, but it stands as a different class and a different question. Then with respect to *Winters* and *Rowlands*, they appear to stand very much in the same class. They are not actually co-operating with the men who break their contracts, or who are sent away drunk, but they are actually co-operating as to the payments. It is not a loose opinion with respect to *Winters*, because with regard to *Rowlands* and *Winters* it appears they did just what you say; and from what was said by *Mr. Whateley* and from what will be said by you, this question of law will, in my mind, be raised; that is, whether persons combining together to obstruct and molest a given manufacturer in order to force him to alter his mode of carrying on his business, and in pursuance of that conspiracy persuaded free men to leave him, or paid free men to leave him, that being the overt act, whether they are guilty of an indictable offence. The thing is so charged in the indictment, and my opinion on the subject here is not as if I was deciding the law in the other court, and laying down the law. I have an opinion on the subject, and with respect to this indictment I should tell the jury, in my opinion that constituted an indictable offence; and should recommend them, if they considered that to be made out, to acquit them of the other part of the charge, and to find

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them guilty of the ninth count only. (f) Then if that be an untenable proposition in point of law, you will have the benefit of it, and in that way the point you were about to submit to me is perhaps answered.

Parry said, what he submitted had reference to *Winters*. He understood his lordship thought that, as to him, the case should go to the jury.

ERLE, J.—It is to go to the jury on that one class of counts, if you understand me.

Parry.—On the ninth count.

ERLE, J.—I propose to lay down, with respect to the ninth count, that if they are of opinion that he conspired to obstruct *Mr. Perry* in his business for the purpose of making him alter his business, and in pursuance of that paid his free workmen to go away and persuaded his free workmen to leave him, they ought to find him guilty; and the question, whether that is an indictable offence or not, will be reserved for discussion hereafter. If it is not, he will go free; if it is, the punishment will be what is proper to be awarded.

Parry then addressed the jury, followed by

Keating, Q. C., on behalf of *Duffield, Woodworth and Gaunt*.

Witnesses were called on the part of the defendants to prove that the book of prices was reasonable and adopted by other manufacturers at *Wolverhampton*, and also to give a different version of a meeting between the masters and the delegates to that given by the prosecutors.

John Elliott, president of the *Tin-plate Workers' Association*, and a member of the *National Association of United Trades for the Protection of Industry*, stated that the three defendants *Peel, Winters and Green* came down to *Wolverhampton* by invitation from the *Tin-plate Workers' Association*, and the witness had various interviews with them and attended three meetings between them and the workmen.

The following question was then put to the witness by *Parry*:—With reference to hired men and apprentices, persons under contract to their employers say, what advice did these three defendants give to the men?

Allen, Serjt., objected that it would not be competent on a charge of conspiracy to give evidence of other facts where the defendants did not conspire, and where they spoke otherwise than in relation to the conspiracy with which they were charged. If such evidence were admissible it would give a person an opportunity of manufacturing evidence to shield him from anything he may be afterwards charged with. He is charged with a crime; he goes about and denies that he committed it. Are the conversations, amongst others in connexion with him, admissible afterwards to prove that he is innocent of that offence?

(f) By the 9th count, *Mr. Justice Erle* evidently meant the class of counts in the indictment of which the 9th was a part: (See the proceedings in the *Queen's Bench, post.*) [J. E. D.]

Parry.—It is not mere conversation, but actually the conduct of the men; acts accompanied by certain observations; it is all material here to show what was the intention of these men. Now, that can be shown by any acts that they do; and he conceived it could be also shown by any advice that they gave in reference to the object they were pursuing. Whether that was a sham and a feint is a question for the jury and not for the court. The counsel for the prosecution suggested that these parties conspired to intimidate by threats. If they conspired to intimidate by threats, they did so at the time they were at Wolverhampton for the purpose of negotiating this book of prices. He submitted that everything said by these men in respect of that book of prices, and all the advice given in the many interviews with the prosecutors, and with the men when the strike commenced, was clearly admissible.

Allen, Serjt.—If taken as part of the *res-gesta* it may be admissible evidence.

ERLE, J., said he would admit the evidence.

The witness then stated that the three defendants recommended all the hired servants to fulfil their contracts to the letter, and if they were dissatisfied at the expiration of that period and wished to leave, they would protect them. That advice was tendered more than once. On the witness being further asked whether he ever heard Peel, Winters or Green either use any intimidating language or threats, or recommend force of any kind?

Allen objected, but

Per ERLE, J.—I think it had better be heard rather than exclude it.

The witness then answered the question in the negative. This witness further stated that he believed the defendant Peel was not in Wolverhampton in July, and that when he was there he lodged at the Seven Stars, and not at the Star, as stated by Mr. Edward Perry.

Alfred Hildreth proved that he printed one hundred copies of the following handbill (which other witnesses proved to have been circulated among the workmen about the time it bore date) at the request of the defendant Winters, who paid him for it:—

“NOTICE! We, the undersigned, being members of the Committee of the National Association of United Trades for the Protection of Industry, which association have kindly assisted the tin-plate workers of Wolverhampton, belonging to them, the last fifteen weeks, who are out on strike for the purpose of securing a uniform list of prices, or in other words to induce Messrs. E. Perry, R. and G. Perry, Fearncombe, and Thurstans, to pay the same price as is being paid by Messrs. Shoolbred and Loveridge, Messrs. Walton, and others in the town. The association above named have rendered pecuniary assistance in a legal and constitutional manner, strictly enjoining the workmen on all occasions, neither to intimidate or endeavour to force or persuade any hired servant to leave his employment, but to fulfil his contract fully and legally;

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but having heard, while at Kidderminster, that certain hired servants had left their employment, this is to inform the public they have done so against the will and without the advice of the society: therefore we entirely disclaim, on the part of ourselves and the association in general, any participation in their leaving, and strongly condemn the practice, if it exists, of rendering assistance or giving advice, in any matter pertaining between any employer and their hired servants.

(Signed)

"THOMAS WINTERS,
"FREDERICK GREEN, and
"EDWARD ROWLANDS, Secretary.

"Dated 16th October, 1850."

Mr. Robinson, an attorney, and mayor of Wolverhampton in 1850, proved that, in consequence of being applied to by Mr. Edward Perry in October, 1850, he endeavoured, without success, to mediate between the prosecutors and the defendants Green and Winters. A few days afterwards Winters called on him, and said that Mr. Perry's workmen, who were under contracts, insisted on violating their contracts and leaving them, and that they had been unable to convince them of the impropriety and illegality of that step; but they thought if he (the witness) would authorize them to say it was wrong, it would induce them to remain in Mr. Perry's service.

Further evidence was adduced to explain how the French workmen left, and alleging that it was in consequence of a breach of contract on the part of the prosecutors.

Allen, Serjt., replied.

ERLE, J., in summing up, said,—“The indictment is for conspiracy, and there are several counts which the learned counsel who have addressed you have endeavoured to reduce into classes, and I will, before you have to consider your verdict, endeavour to reduce them into classes, and put them into the most intelligible shape; and then with respect to those counts, as to which there is no doubt in point of law, I will ask you whether all or any or either of these defendants are guilty. If they should all be guilty on those counts, there will then be no occasion to resort to counts that are doubtful in point of law. If all or any of them should be acquitted in respect of the counts which are clear in point of law, I will then take your opinion as to those counts that comprise a charge, in respect of which there is some contest as to the law. I state that the law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand. I say nothing at present as to the legality of other persons, not workmen, combining with them to assist in that purpose. As far as I know, there is no objection in point of law to it, and it is not necessary to go into that matter, but I consider the law to be clear only to that point—while the purpose of the combination is to obtain a benefit for the parties who combine—

a benefit which by law they can claim. I make that remark, because a combination for the purpose of injuring another is at once a combination of an entirely personal nature, and the law, allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations which have for their immediate purpose the injury or the hurt of another. A great deal has been urged to you most eloquently about the interests of the labouring classes, and their rights in this respect. Their rights are conceded, I believe, to the fullest extent that they were contended for, as far as I understood the language of the learned counsel; but the remark I would make on the other side is, that the exercise of free will and thorough freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is, at present, to allow either of them to follow the dictates of their own will, with respect to their own actions and their own property, and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage. The charge in this indictment on the part of the prosecutors is with respect to three classes of counts, as to which I apprehend the law is clear. The charge is, that the defendants combined together to injure the prosecutor by illegal means, and I will state to you what those three classes are. It appears to me to be beyond all dispute on this evidence, that there was considerable combination and concert by a number of persons, and that the purpose of the concert was to force Messrs. Perry to agree to a uniform book of prices. Take that to be an admitted fact on the part of all the defendants,—and I take that to be the outline—there was a combination. Taking it clearly to be a combination to force the assent to a uniform book of prices, it might be put as a proposition, the assent to certain wages for the workmen. If it stood merely there, it might be doubtful, in point of law, how far such a combination was lawful; but if they combine to bring about that purpose by any unlawful means, unquestionably the indictment would be sustained. I think the three classes in respect of which the law is perfectly clear, are, 1st,—If the purpose of the combination was to be effected by intimidation. There is a statute that secures those rights to the labourers, but prohibits any intimidation to the other labourers. Labourers are to have freedom of action, and those who choose to work for a lower rate of wages are to have their rights secured to them, and any combination of men to prevent them from working for the wages that they should choose, by any intimidation or threat, is an illegal act. Therefore, the first class of counts in this indictment to which your attention will be directed, is, whether these defendants, or any of them, combined together to prevent workmen from working for Messrs. Perry by intimidation to other workmen. There is another class of counts very much to the same purpose. You will have to consider

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whether there is upon the evidence proof, to your satisfaction, that the defendants combined for the purpose of forcing this assent of Messrs. Perry, and intended to bring about that assent by intimidation to Mr. Perry. These counts allege that he was molested or obstructed. If they intended to create alarm in the minds of Messrs. Perry, and so to force their assent to any alteration in the mode of carrying on their business, they would clearly, in my opinion, have violated the law, and be guilty on those counts. There is, also, another set of counts, whereby the defendants are charged to have conspired together for the purpose of inducing workmen to leave the employment of Messrs. Perry, contrary to their contracts. The charge is of conspiring to induce workmen to leave the employ of Messrs. Perry, by reason of their being made drunk, and, by contrivances, being carried off into concealment; and I apprehend, if you are of opinion that those counts are sustained by the evidence, it will be your duty to find the defendants against whom that is made out, guilty. In respect of those three classes of the counts, I do not believe that there is any doubt in point of law that the crime of illegal conspiracy would have been committed by the acts alleged in them. But, supposing all or any of the defendants are acquitted of all those classes of counts, and you should still be of opinion that the combination was for the purpose of obstructing Messrs. Perry in carrying on their business, and so to force them to consent to this book of prices, and in pursuance of that concert, they persuaded the free men and gave money to the free men to leave the employ of Messrs. Perry, the purpose being to obstruct him in his manufacture, and to injure him in his business, and so to force his consent, I am of opinion that that also would be a violation in point of law. That is the class of counts in respect of which the learned counsel for the defendants have claimed a right to dispute the proposition in point of law; and when I have taken your opinion as to these eight defendants in respect of those three first classes of counts, in case all or any of them should be acquitted of those three classes of counts, I will then ask you whether any of them are guilty of the concert to the extent which I have last described. Now, in going over this case, in respect to the eight defendants, and in respect to these charges, I fear it would be impossible to divide the evidence, and to say how much relates to one charge, and how much relates to one defendant. I must therefore ask you to bear in mind that the eight defendants whom you have to deal with at this moment are five of them Wolverhampton men; with respect to three, Duffield and Woodworth and Gaunt, Duffield, you will remember, being at one time in office, and Woodworth being appointed on the committee when Duffield went out. There are, besides, Pratt, who is active but seems to have held no office, and Rowlands, of Wolverhampton, the secretary to the Tin-Plate Workers' Society. These are the defendants,

inhabitants of Wolverhampton, to whom your attention is to be directed, and you are to decide whether all or any of them are guilty. Besides those I have named, there are three who are said not to be Wolverhampton men—Green and Winters, who appear to be delegates from the London Society—delegates from the National Trades Association; and the eighth defendant is Peel, the secretary to that society—the National Trades Association. I think the strongest evidence is in respect of the combining together to take the workmen away, contrary to their contracts, and by making them drunk. I will ask you whether you find all or any or either guilty of that class. Then, whether you find all or any or either guilty of conspiring to bring about this by intimidation to the workmen; and, 3rdly, whether you find them guilty of conspiring to bring about this by intimidation to Messrs. Perry.” Erle, J. then went through the evidence for the prosecution and the defence. In reading over the evidence of the prosecutor with respect to his interview with the defendant Green, his lordship said, “I think, with respect to any intimidation to Mr. Perry, there does not seem to be anything like a direct threat of personal violence, or anything like a direct threat of actual violence to his property; but if a powerful body intimate that his lawful freedom of action will be interfered with unless he consents to certain terms, it will be for you to consider whether he might not be reasonably said to be intimidated if such matters occurred to him.” In reference to the conversation with Green, respecting the reason of the discharge of the prosecutor’s workman, Thomas Preston, and the defendants’ inquiry whether it was not because he belonged to the club, and his observation or threat which followed that, that if it was the reason they should take all the men out, and they should stop the supplies, so that not a man should call, the judge observed that this was material, as bearing on that which afterwards took place. “If a man say that an event will happen, and it does afterwards happen, it is for the jury to consider whether the man who says it may happen, did not know the way to bring that event about, and whether, if it did afterwards happen, he had not a concern in bringing it about. With regard to the letter of the 2nd of April, it used the word ‘mediators,’ and said the parties were to call in the perfect hope that they were to be taken ‘purely as mediators, and not as presuming to visit you in an offensive spirit of dictation.’ But then the effect, on a man’s mind, of the expression, saying ‘We do not come in an offensive spirit of dictation,’ after notice of the power of the body, and what they could do, was certain to call up, in the mind of a man, the feeling that these were persons who had the power, and might exercise it. When the book of prices was pressed on Mr. Perry, he said he would consider of it, and did not give a direct answer as to its adoption; and if a man does not venture to speak his mind, what is the reason why he does not? It is because he apprehends some evil consequence will arise, and he is in fear from that evil consequence.” After

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calling the attention of the jury to the placard exhibited in the Star window, and remarking that it was signed 'William Peel, General Secretary on behalf of the Central Committee,' and mentioned Messrs. Green and Winters, Mr. Justice Erle said, "all those who assented to the publication of this document would be answerable for it; it would be good evidence against them. The way I thought it was evidence against Peel was, if it was put up in the window, containing a long statement of matters, which were in effect a narrative by William Peel, in his own person; if the jury thought he saw it in the window, and let it stay there, without contradicting it, it would be good evidence for them that he authorized that statement. That is the way I thought it was evidence against him. Then, as to Winters and Green, who are announced by name in the same bill, any of them that saw that bill in the window, wherein a matter is stated by them, and they allow that to be held forth with their consent, it is very much as if they had said, 'All this is a bill we recommend.' Green was seen through the window at the time the crowd were reading it outside. This is posted up at the Star and Swan, where numbers of men were, and where all those charged in this indictment were from time to time publicly resorting. The purpose of it is to demand a general levy. All the members of the National Association are to subscribe sixpence extra towards the contest that was about to begin at Wolverhampton. That is the purport of the document. * * * Mr. Perry said Peel lodged at the Star when he was there. Mr. Elliott, the president, said he did not lodge at the Star, but at the Seven Stars, and Elliott also stated, when Peel was there he was in constant communication with him, and he believed he was not there in July. He believed he must have known it if he had been. That is the negative. Mr. Perry swears he was there, but it is entirely a question for you, gentlemen. The whole of this document is brought in at that stage, and stands on that evidence. The whole of the document is before you. I do not know that I need more particularly advert to it. There is no attempt to repudiate the document. It stands on that evidence, and it is entirely for you to consider whether that was published by the authority, and known to any of these men, and consented to by them." With reference to the alleged intimidation of the workmen, his lordship said there was nothing like a threat of ill-usage, except as regarded Griffiths, but it seemed very much as if language was used which one man free of another is not much in the habit of using in the way of command, and if the command was obeyed, it was for the jury to say whether there was any apprehension of fear inducing the compliance." With regard to the defendants Rowlands and Winters, Mr. Justice Erle said, that Shelton was the witness who brought Winters into the case. "Winters and Green were the delegates, but as to Winters, the only part he takes is to pay the money, and the counsel on the part of the prosecution have submitted it was a scheme on the part of the National Association

—a part of the coercive measures, to force this book on the Messrs. Perry, and that all these delegates from the National Association were there, to make Messrs. Perry repent that they did not consent to that book which they were putting on them. The only part Winters took was in paying Shelton, who is a free workman, and another man who comes there; and that is the reason why the fourth question will be put to you, after you have disposed of those three classes. Shelton was a tin-plate worker. He says, 'The first week I received it at the Red Cow, some one else counted it out, but Rowlands pushed it across the table to me.' The evidence as to Rowlands, I may remind you, is very scanty indeed; in my mind he stands in the same class as Winters. He is secretary to the Wolverhampton Association, and Winters is a delegate from the London Association. I have not met with them doing what I call a distinctly illegal act, that is, making a man's workmen drunk, and sending them away; I have not met with them making a man break his contract, or inducing the apprentices to go away, or using threats; I have not been able at present to see any of those matters; but they are paying the men. Shelton is a free man, and they are paying him for coming out on the strike. He says, 'I was ordered to come out by Rowlands the secretary, unless the masters would give me the book prices; I obeyed the order because I thought I should not be behaving well to the parties if I did not; nothing was said about the consequences.' He was asked if he knew anybody who refused to come out have anything done to him. He said, 'he never heard of anything being done, nor had any one threatened him.' On cross-examination he said, 'Thirteen weeks I was walking about Wolverhampton; I was not a hired servant; Rowlands pushed the money across to me; I was ordered to come out if I had not the book prices; I had nothing to do with the book of prices; I went into the Red Cow from my work; I told Rowlands that I had partly finished my work, and I said, 'What am I to do?' He said, 'If you do not receive the book prices you must come out;' I said, 'How shall I know whether I have the book prices or not?' He said, 'You must come down to me, and I will tell you.' 'I was paid 6s. 3d. for three days; that was for half a week; I worked and came out in the middle of the week; I then had three days' pay.'" So that the order, when fully explained, is not more than a conversation. The learned judge, after observing that the witness, Edward Robinson, said he was paid by Green at times, and by Winters at times, and that therefore both the men that Winters paid were free men, stated that the case against Rowlands and Winters stood on their payment to the two or three men, but they had been in company from time to time with those who took a prominent part in transactions which were of a very questionable nature, if the witnesses were believed. In conclusion, Mr. Justice Erle said, "Now, with respect to those three classes of counts, as to the concert to force a book on Messrs. Perry, I say, did they intend to induce workmen who were under contracts

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to leave their work by making them drunk, and by taking them away? That is the first class. Did they intend to carry out the conspiracy by taking away the workmen contrary to law? Secondly, did they intend to make the workmen leave by intimidating them? Thirdly, did they intend to make Messrs. Perry come into this by intimidating them?"

The jury returned a general verdict of Guilty on all the counts, with the exception of Thomas Pitt, in respect of whom a verdict of Not guilty was taken.

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1851.

November 21.

(Before Lord CAMPBELL, C.J., PATTESON, J., COLERIDGE, J.,
and ERLE, J.)

REG. v. ROWLANDS AND OTHERS. (a)

*Conspiracy—Indictment—Statutes 6 Geo. 4, c. 129, and 4 Geo. 4, c. 34
—Overt acts—Sufficiency of allegation.*

In an indictment for conspiracy to commit an offence under the stat. 6 Geo. 4, c. 129, s. 3, namely, by threats or intimidation, or by molesting or in any way obstructing another, to force or endeavour to force any journeyman, manufacturer, workman or other person hired or employed in any manufacture, to depart from his hiring, employment, or work, or by threats or intimidation, or by molesting, or in any way obstructing another, to force, or endeavour to force, any manufacturer or person carrying on any trade or business to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, it is sufficient to follow the words of the statute, and it is not necessary to set out the means of obstruction, the nature of the molestation, or what the threats were.

Semble, a distinction exists in this respect between an indictment or conviction for the offence itself, and a charge of conspiracy, in which the threats, &c., are the means used for carrying out the purpose.

It is not necessary to set out the names of the workmen threatened, &c. Therefore a count alleging that R. P. and G. P. carried on trade and business as manufacturers of japanned and tin wares at W., and that divers, to wit, fifty persons, were workmen, and were hired and

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

employed by and worked as workmen for the said R. P. and G. P., in their said trade and business; and that the defendants, on, &c., did amongst themselves unlawfully conspire, combine, confederate, and agree together, by unlawfully molesting the said workmen so hired and employed by and working for the said R. P. and G. P., in their said trade and business as aforesaid, to force and endeavour to force the said workmen so hired and employed by and working for the said R. P. and G. P. as aforesaid, in their said trade and business as aforesaid, to depart from their said hiring, employment, and work, to the great damage of the said R. P. and G. P., &c., was held sufficient. So also, other counts, charging the overt acts to be by "unlawfully using threats" to, and by "unlawfully intimidating" the workmen, were held sufficient.

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A conspiracy to induce and persuade workmen under contract unlawfully to absent themselves from their service is an indictable offence.

In a count for that offence, it is not necessary to allege that the defendants knew that the workmen were under contract, nor to set out the names of the workmen, nor to allege that the contracts were entered into after the passing of the statute 4 Geo. 4, c. 34, s. 3, which makes any servant, &c., who shall contract with any person whomsoever to serve him for any time whatsoever, or in any other manner, and shall not enter into or commence his service according to his contract (such contract being in writing, and signed by the contracting parties), or having entered into such service, shall absent himself from his service before the term of his contract (whether such contract shall be in writing or not) shall be completed, liable to three months' imprisonment on conviction.

Held, therefore, that a count in the following form is sufficient:—"That heretofore, before, and at the time of the committing of the offence hereinafter in this count mentioned, the said R. P. and G. P. carried on trade and business as manufacturers of japanned and tin wares at W. aforesaid, and that divers, to wit, fifty persons, being artificers, had contracted with the said R. P. and G. P. to serve them as workmen and artificers in their said trade and business for certain times and periods respectively agreed upon between them and the said R. P. and G. P.; and that the said persons, so being such artificers as aforesaid, had entered into the service of the said R. P. and G. P. as such manufacturers as aforesaid;" and that the defendants, on, &c., "did amongst themselves unlawfully conspire, combine, confederate, and agree together, by divers subtle means and devices, to induce and persuade the said artificers, so having contracted with the said R. P. and G. P. as aforesaid to serve them in their said trade and business for certain terms and periods so as aforesaid respectively agreed upon between them and the said R. P. and G. P. as aforesaid, and so having entered into the service of the said R. P. and G. P. as aforesaid, unlawfully to absent themselves from the said service of the said R. P. and G. P., without the consent of the said R. P. and G. P., or either of them, before the respective terms of their said contracts as aforesaid were completed, to the great damage of the said R. P. and G. P.," &c.

Quære, whether counts in the following form are insufficient, as being too vague:

1st. "And the jurors aforesaid, &c., do further present, that [the

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defendants], with divers other evil-disposed persons, on the day aforesaid, in the year aforesaid, with force and arms, at, &c., did unlawfully conspire, combine, confederate, and agree together unlawfully to intimidate, prejudice, and oppress one R. P. and one G. P. in their trade and occupation as manufacturers of japanned and tin wares, and to prevent the workmen of the said R. P. and G. P. from continuing to work for the said R. P. and G. P. in their said trade and occupation, to the great damage of the said R. P. and G. P.," &c.

2nd. "And the jurors, &c., that [the defendants], with divers other evil-disposed persons, on, &c., did unlawfully conspire, combine, confederate and agree together, by divers subtle means and devices, and wicked acts and practices, to injure and oppress the said R. P. and G. P. in their trade, business, and occupation of manufacturers of tin and japanned wares, and to induce the workmen of the said R. P. and G. P. to depart from their employment and work with the said R. P. and G. P. before the period of their agreement with the said R. P. and G. P. was completed, to the great damage of the said R. P. and G. P.," &c.

3rd. "And the jurors, &c., that [the defendants], with, &c., on, &c., did unlawfully conspire, &c., unlawfully to intimidate, prejudice, and oppress one R. P. and G. P. in their trade and occupation as manufacturers of, &c., and to entice and seduce away the workmen of the said R. P. and G. P. from the employment of the said R. P. and G. P., and thereby to injure and oppress the said R. P. and G. P. in their said trade and occupation, to the great damage," &c.

Under a count alleging that the defendants did unlawfully conspire, combine, confederate and agree together, by molesting the said R. P. and G. P., to force and endeavour to force the said R. P. and G. P., so carrying on their trade and business as aforesaid, to make an alteration in the mode of conducting and carrying on their trade and business as aforesaid: Held, by Erle, J., that evidence might be given of attempts to force men under contracts to leave.

AT the commencement of the Term, an application was made on behalf of the defendants in the two preceding cases to arrest the judgment, and also for a new trial, and it was arranged that the motion should be made when the defendants were brought up for judgment.

Allen, Serjt. (with whom were Huddleston and Kettle), now moved for judgment against the defendants Rowlands and others, included in the second indictment. As the three defendants in the indictment first tried were included in the second case, in which there was a general verdict of guilty, it would be a more convenient course to have that case decided first.

The Attorney-General, on behalf of the defendant Green, now moved for a rule to show cause why the judgment should not be arrested, on the ground that the indictment was bad on the face of it. The indictment was for conspiracy, and contained twenty counts. (b) The first six counts and the 18th count were framed on the first part of the 3rd section of the statute 6 Geo. 4,

(b) See ante, p. 406, and p. 438.

c. 129, and charged a conspiracy to do acts prohibited by that section. Those counts used the general words of the act, alleging that the defendants conspired, by threats, to endeavour to do what the statute forbade, namely, to force or endeavour to force workmen to depart from their employment, by threats, or intimidation, or molestation to the workmen. The second class of counts, viz., the 11th and 12th counts, charged the same conspiracy with respect to workmen about to be hired. The third class of counts, the 13th, 14th, and 15th, alleged that the workmen were actually hired, and had contracted. The 7th, 8th, 9th, and 10th counts were also founded on the same section of the statute, which made it unlawful for persons, by threats or intimidation, or by molesting, or in any way obstructing another, to force or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, to depart from his hiring, employment or work, or by threats or intimidation, or by molesting, or in any way obstructing another, force or endeavour to force any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting or carrying on such manufacture. These counts charged the defendants with molesting and obstructing the prosecutors to force their workmen to depart, or to make the prosecutors alter the mode of carrying on their business; and the 20th count alleged a molestation of the workmen to compel the prosecutors to increase the rate of wages. All these counts proceeded on and adopted the words of the act of Parliament, "threats," "intimidation," "molesting," and he submitted that they were all bad, as being too general. Two questions arose upon this, 1st, Whether the indictment would be good at common law; and, 2ndly, Whether, if bad at common law, the question would be, whether it was helped by the statute. On the first point, the count would be bad at common law as too general. The 3rd count alleged that the Messrs. Perry were manufacturers, and that workmen were hired by and employed by them, and that the defendants conspired, by unlawfully *intimidating* the workmen, to force them to depart from their hiring. In the case of *O'Connell and others v. The Queen* (11 Clarke and Finnelly's Reports, 155), the effect of the word *intimidation* was considered. The 6th count of the indictment, in that case, alleged that the defendants unlawfully, maliciously and seditiously contriving, intending and devising, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the government, laws and constitution of this realm as by law established; heretofore, to wit, &c., unlawfully, maliciously and seditiously did combine, conspire, confederate and agree with each other, and with divers other persons whose names are to the jurors aforesaid unknown, to cause and procure, and aid and assist in causing and procuring, divers subjects of our said Lady the Queen, to meet and assemble together in large numbers, at various times and at

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different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of the great physical force at such assemblies and meetings, changes and alterations in the government, laws and constitution of this realm as by law established, in contempt, &c. The 7th count was the same as the 6th, only alleging that the especial object of the intimidation was to bring about a dissolution of the Union between Great Britain and Ireland. It was objected that these counts were bad, as too general, and did not disclose with sufficient certainty an agreement to commit an indictable offence. Chief Justice Tindal, in delivering his opinion in that case, said, with respect to those counts, "We all concur in opinion, that they do not state the illegal purpose and design of the agreement entered into between the defendants, with such proper and sufficient certainty, as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law. Each of those two counts does, in substance, state the agreement of the defendants to have been 'to cause and procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of the great physical force at such meetings, changes in the government, laws and constitution of the realm.' Now, though it may be inferred, from this statement, that the object of the defendants was probably illegal, yet it does not appear to us to be so alleged with sufficient certainty. The word 'intimidation' is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, employed on this occasion in its popular sense; and in order to give it any force, it ought, at least, to appear from the context what species of fear was intended, or upon whom such fear was intended to operate. But these counts contain no intimation whatever upon what persons this intimidation was intended to operate; it is left in complete uncertainty, whether the intimidation was directed against the peaceable inhabitants of the surrounding places; against the subjects of the Queen dwelling in Ireland, in general; against persons in the exercise of public authority there; or even against the Legislature of the realm. Again, the mere allegation that these changes were to be obtained by the exhibition and demonstration of physical force, without any allegation that such force was to be used, or threatened to be used, seems to us to mean no more than the mere display of numbers, and consequently to carry the matter no further." [CAMPBELL, C. J.—Was not the defect in those counts, the not stating the *objects* of the conspiracy with proper certainty. COLERIDGE, J.—The indictment did not state who were to be intimidated.] The judgment shows that *intimidation* is not necessarily to be taken in a bad sense. Next, with respect to the word

"obstruction." In the case of *Frost v. Lloyd* (9 Q. B. 130; 16 L. J. (N. S.), 13, Q. B.), which was an action of *replevin*, it was held that an avowry by the bailiff of a manor, justifying the seizure as a distress for an amerciamment, stating that the plaintiff had unlawfully obstructed the jurors of the manor in their examination of the weights and measures, and that the jury had presented that the plaintiff had so obstructed them, whereupon he was amerced, &c., was bad for not stating in what the obstruction consisted. In the course of the argument, Mr. Justice Patteson said (as reported in *The Law Journal*), "The presentment must have been founded on some evidence; that evidence must condescend to particulars; then should not the avowry, in alleging the fact, condescend to particulars also?" and Lord Denman also observed, "It may not be necessary to set out the evidence, but some of the particulars which go to make up the obstruction should be stated. If it could be contended that it was sufficient to allege that the jury had authority to decide on the subject, and that they had adjudged the plaintiff guilty of an obstruction, the case would be different; but you have found it necessary to aver the obstruction in fact." After argument, Lord Denman says, "I think this averment, as to the obstruction, insufficient; it may mean either that the plaintiff deterred the jury from acting, by observations made by him, or that he interfered by material force to prevent them." Mr. Justice Patteson says, "It is admitted that it is not sufficient to rest on the presentment alone, but that the avowry must show some act done; as it alleges an obstruction, it ought so to allege it that the court can see that there was one." Mr. Justice Williams, also, "Suppose an issue joined upon the allegation that the plaintiff obstructed the jury, what an endless field of inquiry would it open; I cannot see the difficulty of describing in what the obstruction consisted, for there must have been some evidence of facts as a foundation for the amerciamment." Moreover, in cases of conspiracy, it is necessary that the indictment show that the conspiracy was for a purpose necessarily criminal. In the case of *The Queen v. Peck and others* (9 A. & E. 686), it was held that a count for conspiring to deceive and to defraud divers of Her Majesty's subjects, who should bargain with the defendants for the sale of goods, of great quantities of such goods, without making payment, remuneration or satisfaction for the same, with intent to obtain profit and emolument to defendants, was bad as not showing that the conspiracy was for a purpose necessarily criminal; and also, that a count charging that the defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy, executed a false and fraudulent deed of bargain and sale, and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emolument to themselves, was bad, for omitting to show in what respect the deed was false and fraudulent. It was objected that the indictment was bad for uncertainty, and after argument and time taken to consider, Lord Denman, C. J.,

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delivered the judgment of the court—"We think that the count is defective in not stating, with sufficient particularity, what the defendants conspired to do. It states that they conspired to deceive and defraud divers of Her Majesty's subjects who should bargain with them for the sale of goods, of great quantities of such goods, without making payment or other remuneration or satisfaction for the same. Now, obtaining goods without paying is not necessarily a fraud; the words might apply to the obtaining goods to sell on commission. Therefore we are of opinion that that count is bad. We also think that the second count is defective for a like reason. It alleges that the defendants, in pursuance of the conspiracy there mentioned, did make and execute a false and fraudulent deed of bargain and sale, with intent thereby to obtain emolument for themselves, but it does not state in what respect the deed was false and fraudulent; and therefore we have only the prosecutor's general opinion upon this point, not the facts on which it is founded. The judgment must be reversed." But it will be said that in this case the parties have followed the words of the statute. Now, although in many cases and for many purposes it may be sufficient to follow the words of the statute, an indictment for conspiracy should go further, and set forth the circumstances which constitute the particular offence provided for by the statute. A series of cases on this subject with respect to informations, is to be found collected in Paley on Convictions, 3rd edit. pp. 108-113, showing that in many cases it was not sufficient to follow the words of the statute. "It is sometimes also necessary, in pursuance of the intent of a statute, to adopt a narrower description than what is conveyed in the literal terms of the act. This appears from the construction which has been put upon the Game Act, 5 Anne, c. 14. It has been held that a conviction on that statute, for *keeping* a gun, alleged to be 'an engine for destroying game,' cannot be supported; for though the words of the act prohibit the keeping or using 'any engine to kill and destroy game,' it is so construed as to confine the offence to *keeping* to those things which can only be used for the purposes prohibited by the act, whereas a gun may be kept without any unlawful design: (*R. v. Gardner*, Andrews, 55; 2 Str. 1098; see also, for the same point, *Wingfield v. Stafford*, 1 Wils. 315.) So in an action of debt on the game laws, an objection in arrest of judgment was taken to the declaration, because it stated only that the defendant used a gun, 'being an engine to kill and destroy game,' without averring that he used it for the destruction of game. Though the omission in that case was held to be cured by the verdict, it was distinctly admitted that it would have been bad in a conviction; and the authority of the last-mentioned case was not attempted to be questioned." (*Avery v. Hoole*, Cowp. 825.) "But under the same statute of 5 Anne, c. 14, *keeping* a *lurcher* is sufficient in a conviction; for the statute expressly mentions *lurchers*, and the

prohibition is to keep *or* use disjunctively:" (*R. v. Filer*, 1 Str. 496.) The writer then comes to a second position. He says: "Another rule in describing the offence is, that it is not sufficient to state as the offence that which is only the legal result of certain facts; but the facts themselves must be specified, that the court may judge whether they amount in law to the offence."

[CAMPBELL, C. J.—The *corpus delicti* there is the act. In the case before us the *corpus delicti* is *conspiracy* to do the act.] If necessary to set out the facts in an indictment for the act itself, it is also necessary in an indictment for conspiring to do the act. Paley continues—"A conviction for profane cursing and swearing set forth the charge, viz., that the defendant did profanely swear fifty-four oaths, and profanely curse one hundred and sixty curses, *contra formam statuti*; and the deposition of the witness was worded in the same manner. Besides a valid objection in describing the quality of the offender, the court held the conviction bad by reason of the oaths and curses not being set forth. They said, 'what is a profane oath or curse is a matter of law, and ought not to be left to the judgment of the witness. The witness here takes upon himself to swear the law, and it is a matter of great dispute among the learned what are oaths and what curses.' They referred to the case of *Colborne v. Stockdale* (1 Str. 493) as fresh in every one's memory, where it was held (on a plea of the Statute of Gaming) that the particular game ought to be set out, because what is gaming is a matter of law: (*R. v. Sparling*, 1 Str. 497.) Many similar convictions have since been quashed for the same reason, viz., that the particular oaths and curses were not set forth: (*R. v. Popplewell*, 1 Str. 686; *R. v. Chaveney*, 2 Ld. Raym. 1368.) But it is sufficient if it be for swearing one hundred and fifty oaths in these words, viz. (specifying the words once, without repeating each one hundred and fifty times): (*R. v. Roberts*, 1 Str. 603.) Upon this point, also, of the necessity of stating not merely the legal effect in the terms of the statute, but the particular acts upon which the court can judge of the result, may be mentioned the case referred to by Mr. Justice Denison, in the case of *R. v. Jarvis*, in these terms: 'It was said, that in a conviction it is sufficient to pursue the words of the statute; but I think that it is not so, and there are many cases where it has been ruled otherwise. Among other instances, it was so determined in the case of *R. v. Chapman* (Easter Term, 28 Geo. 2), upon a conviction of a person for *robbing an orchard*, which the court held not sufficient, but it ought to have appeared of what and how the orchard was robbed, that they might judge whether it were a robbery within the meaning of the 43 Eliz. c. 7:' (1 Burn. 148.) The following is an example of the like rule to that which governs the preceding cases, viz., that where the act characterizes the class of offences prohibited by a general description, the particular overt acts must appear in the conviction, in order to ascertain their legal

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effect. This was upon the statute 39 & 40 Geo. 3, c. 106, prohibiting, under a penalty, *all agreements* by any journeymen manufacturers *for controlling* any person carrying on any manufacture, &c., and giving a summary form of conviction in which *the offence* is required to be stated. The defendants were convicted of having been unlawfully concerned in the *making and entering into a certain agreement* for the purpose of controlling W. B., a manufacturer, contrary to the form of the statute. It was urged against the conviction, that the agreement itself ought to have been set forth, in order that the court might judge whether it were an illegal agreement for the purpose of controlling the master manufacturers, within the meaning of the act of Parliament. The Court of King's Bench concurred in that argument, and quashed the conviction. It is not enough, to use Lord Ellenborough's words, that the agreement should be for the purpose of controlling, that is, with the intent to control; but it must be entered into *for* controlling, that is, for effecting that object, and the court cannot say that this was such an agreement without seeing that it was:" (*R. v. Neild*, 6 East, 417.) That case was, it is true, modified by the subsequent case of *Rex v. Ridgway* (5 B. & Ald. 527), but the former case was still applicable, and is only cited for that purpose, to show the strictness with which the rule in question is applied. "It has been observed," continues Paley, "that the description of the offence must at least be as particular as that used by the statute. But it has also been seen, from the instances just noticed, that in many cases it must be more so; and several examples have been given, that it is not enough to follow merely the words of the statute. It may, indeed, be collected as a general rule from the foregoing and following cases, that where an act, in describing the offence, makes use of general terms which embrace a variety of circumstances, it is not enough to follow in a conviction the words of the statute, but it is necessary to state what particular fact prohibited has been committed." The writer then proceeds to state that this doctrine is exemplified in a case where the conviction was on the general act, 22 Geo. 3, c. 47, s. 13, against the insurance of lottery-tickets, which makes it unlawful "to insure for or against the drawing of any tickets (there referred to), or to receive any money or goods in consideration of any agreement to repay any sum, or to deliver goods if any such tickets shall prove fortunate or unfortunate, or on any *other chance or event* relative to the drawing of any such ticket, whether as to its being drawn fortunate or unfortunate, or the time of its being drawn or otherwise howsoever, or under any pretence, device, form, denomination, or description whatever, to promise or agree to pay any sum, or deliver any goods, or to do or forbear anything for the benefit of any person, with or without consideration, *on any event or contingency* relative or applicable to the drawing of any such ticket," under a penalty of 50*l*. The information stated "that J. James, the defendant, did, *under a certain pretence or device*,

promise and agree to pay a sum of money on the event or contingency relative and applicable to the drawing of a certain number or ticket (No. 27), on the fifteenth day of drawing the lottery authorized by an act referred to, contrary to the form of the statute." The conviction then, after setting out the summons (which was "to appear to answer the matter of the complaint aforesaid, contained in the said information"), and the defendant's non-appearance, stated the evidence of two witnesses, S. C. and W. R., viz., "that the said S. C., on the 2nd of December instant, at the place named, insured with the said J. James a certain ticket, No. 27, as to such number not being drawn on the fifteenth day of drawing the said lottery, in consideration of which the said S. C. paid to the said J. James the sum of £ , and for which the said J. James promised to pay to the said S. C. the sum of 1*l.* 1*s.*, provided the said number was drawn on the said fifteenth day," &c. The other witness deposed to his having been present at the transaction. The adjudication then followed in the regular form. It was objected, that the information was too general, in not properly specifying the fact, or setting out any of its particulars, as the sum received, the pretence, the person with whom the insurance was made, &c. This was allowed to be a valid objection, and the reasons assigned by the court comprise the principles applicable to this class of cases. Willes, J., said, "In summary convictions the charge must be precisely set out. This charge is general, and does not point out that against which the party is to defend himself. The evidence cannot go further than the charge. You should have alleged the fact in the information, in the same manner as you have in the evidence. As to the defendant's not coming in upon the summons, he was not obliged to do it; the charge was too indefinite to call upon him to answer it." "It is not true," Mr. Justice Buller says, "that in framing a conviction it is sufficient to follow the words of the statute in all cases. In some indeed it may, as where the statute gives a particular description of the offence; but it is otherwise where a particular offence is included under a general description. Where a particular act constitutes the offence, it may be enough to describe it in the words of the Legislature; but where the Legislature speaks in general terms, the conviction must state what act in particular was done by the party offending, to enable him to meet the charge. The offence here is promising, under certain circumstances, to pay so much money. Some circumstances there must be shown; it must be stated for what the money is so promised to be paid:" (*R. v. James*, Cald. 458.) The same principle was applicable to this case. The statute 6 Geo. 4, c. 129, made use of general terms. It did not define any particular act, but used general words, capable of comprising several acts, some of which might be innocently done. In *Turner's case* (9 Q. B. Rep. 80), it was held that a conviction and committal under the statute 9 Geo. 4, c. 34, s. 3, reciting an information and complaint by the agent of D. that the prisoner had contracted to

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serve D. for a term, and did, before the contract was completed, "absent himself from his said service, and did thereby then and there neglect to fulfil the same, contrary to the form of the statute," &c., and the document added, therefore "it manifestly appears to me (the justice) that the prisoner is guilty of the said offence charged upon him in the said information and complaint, I do hereby convict him of the offence aforesaid;" and I do hereby order and adjudge that the prisoner, "for the offence aforesaid, be imprisoned," &c., was bad; the information showing no offence, as there might be some lawful excuse for the absence, though the statute simply makes the party's absenting himself from service the ground of complaint. The conviction in that case was in these terms: "Be it remembered, that on, &c., Richard Thompson, &c., agent for John Darlington, &c., came before me, J. B. W. Sanderson, Esq., &c., and upon oath, &c., informs me, &c., that Seth Turner the younger, of, &c., on, &c., did contract with the said John Darlington to serve him, the said J. D., as a miner, for the term of eleven calendar months from, &c., and that the said Seth Turner did afterwards, to wit, &c., enter into the said service of the said J. D., and did afterwards, and before the term of his said contract was completed, to wit, on, &c., at, &c., absent himself from his said service, and did thereby then and there neglect to fulfil the same, contrary to the form of the statute in that case made and provided." The information then proceeded to state the issuing of the warrant, the apprehension and examination of the defendant, and set out the contract of service and the evidence on both sides, and then proceeded, "Therefore it manifestly appearing to me, the said T. B. Sanderson, so being such justice as aforesaid, that the said Seth Turner the younger is guilty of the offence charged upon him in the said information and complaint, I do hereby convict him of the offence aforesaid: and I do hereby order and adjudge that the said Seth Turner the younger, for the offence aforesaid, be imprisoned in the House of Correction at Kirkdale aforesaid, there to remain and be held to hard labour for the term of three months," &c. The statute 4 Geo. 4, c. 34, s. 3, upon which the conviction was founded, enacted "that if any servant in husbandry, or any artificer, calico-printer, handicraftsman, miner, collier, &c., shall contract with any person or persons whomsoever, to serve him, her or them, for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing, and signed by the contracting parties), or having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, then and in every such case it shall and may be lawful for any justice of the peace, &c., upon complaint thereof made upon oath to him, &c., to

issue his warrant for the apprehending every such servant, &c., and to examine into the nature of the complaint; and if it shall appear to such justice that any such servant, &c., shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid, it shall and may be lawful for such justice to commit every such person to the house of correction," &c. The information, therefore, followed the words of the statute, but it was held, nevertheless, that it was not sufficient. Lord Denman, C. J., in giving judgment, said,—“The question, at last, comes to this: whether the information states any offence? I think it does not. It is essential that there should be on the face of the information something on which the justices may convict. Now, to complain merely that the party absented himself from his service is to charge no offence, unless it be added that this was done without leave or lawful excuse. The want of leave is a circumstance that the employer and his agent have the means of knowing and stating; other lawful excuse there may indeed be, which the complainant may not know of, but he might, at least, show that he knew of no such excuse. Then the conviction is merely of the offence charged in the information, and none is charged.” And Mr. Justice Patteson says: “The conviction is only of the offence charged in the information. Is any offence charged? The charge is that the prisoner absented himself from service. Must that be laid to be without lawful excuse? If it must, no offence is here charged. The information does add that the prisoner did thereby ‘neglect to fulfil the same,’ contrary to the statute; but that is not a direct charge; it is only an inference from what precedes; if the absenting does not constitute an offence as laid the inference is not warranted. It therefore comes to this: whether it is necessary to negative lawful excuse? I think it is, and that the absence must be shown to be wilful, or without lawful excuse. As this information is framed, it would have been proved by showing that the prisoner had stayed away because he had broken his leg. Whether the magistrate might convict simply for neglecting to fulfil the contract, on account of the language of the statute, I do not say.” And Williams, J.,—“I always thought that the law was properly laid down by Lord Mansfield, in *Rex v. Corden* (4 Burr. 2279), that if the fact as charged may be consistent with the innocence of the prisoner, no offence is charged. It is argued that the information is merely a notice given to show what is to be proved; but that is not so; it is the foundation of the conviction, inasmuch as it is what gives the magistrates jurisdiction, and that is the reason why it is examined so strictly. The question then comes to this: on whom is the onus of negating the excuse? It is said to be sufficient to follow the words of the statute; but many cases may be put in which a party may absent himself from service, within the general terms of the statute, consistently with perfect innocence; the onus, therefore, is on the complaining party. In

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Rex v. Corden the complaining party was a third person; and, unless the consent of the owner was expressly negatived, nothing wrongful would appear, although if the owner himself had complained, there might have been some evidence of want of consent. This last distinction, if tenable, is inapplicable here; the whole question is, whether it be enough to say, nakedly, that the prisoner absented himself from the service. The averment introduced by the words 'and did thereby,' can add nothing." This case is an express authority to show that it is not sufficient to follow the words of a statute. [CAMPBELL, C. J.—The rule is, that if it is consistent with the allegation that the defendant has not committed any offence, then the indictment is not sufficient.] In the present case the general words of the statute were made use of and applied to the charge. The acts of the defendants were charged as being unlawful, but that was not sufficient; the facts should have been stated so that the court might judge of their sufficiency.

Whateley, Q. C. (with whom was *Lawrence*), for the defendants Rowlands and Pratt, also moved to arrest the judgment. It must now be taken as clearly insufficient that a defendant *may* have committed an offence. That was laid down in *O'Connell's case*, but it was not new law. Now what was the ordinary meaning of the words made use of in the counts of this indictment? "Molesting" was the word employed in the first count. Now "molestation" was defined by Dr. Johnson to be "disturbance, uneasiness caused by vexation;" and he cites a passage from Brown's *Vulgar Errors*, "Though useless unto us, and rather of *molestation*, we refrain from killing swallows." There is no legal significance to be attached to the word "molestation." Other counts employed the word "threats," "by threats"—what threats? "I will not consort with you?" "I'll not keep company with you." "I'll not join the club you belong to." The counts ought to have shown that the threats were that the defendants would do the specific acts complained of. Then, as to obstructing; the word "obstruction" included many acts of opposition that were perfectly lawful. For example, obstructing the passing of an act of Parliament may be lawful. It was no answer that the words of the statute had been followed. In addition to the cases already referred to on that point there were several authorities to that effect. A conviction under the Pilot Act, 6 Geo. 4, c. 125, for continuing in charge of a ship after a licensed pilot has offered to take charge, must show, on the face of it, that the defendant knew of the offer; for it is not enough to describe the offence in the words of the statute creating it, without adding facts to show that the defendant was a party to it: (*Chaney v. Payne*, 1 Q. B. Rep. 712.) Lord Denman, in delivering judgment in that case, said, "It may be sufficient, in describing an offence in a conviction, to follow the words of the act creating the offence, so far as the description of it goes; but it is always necessary to add such facts as show that

the person convicted was a party to that offence so described, which is not done here, inasmuch as it is plain that the continuing in charge of a ship, in *ignorance* of a licensed pilot having offered to take it, is not the offence; but the offence must depend on the knowledge of the party charged, although the word '*after*' is the only word used in the section in question." The allegation that the acts were done "unlawfully" meant nothing: (*Rex v. Seward*, 1 A. & E. 712.) "The averment is in no case essential, unless it be part of the description of the offence, as defined by some statute; for if the fact as stated be illegal, it would be superfluous to allege it to be unlawful; if the fact stated be legal, the word *illicite* cannot render it indictable; and the same observation is applicable to the terms wrongfully, unjustly, wickedly, wilfully, corruptly, to the evil example, falsely, maliciously, and such like:" (Starkie's Criminal Pleading, 2nd edit. p. 79.) The 11th and 12th counts alleged that divers persons were being hired and employed as workmen for the prosecutors, and that the defendants conspired, by molesting and obstructing, and using threats and intimidation to such workmen as might be willing to be hired and employed by the prosecutors, but there was no allegation that the defendants *knew* that the workmen were willing to be so hired and employed. The 13th, 14th, and 15th counts alleged that artificers had contracted with the prosecutors to serve them as workmen for certain periods, and had entered on their service, and that the defendants conspired to induce and persuade the said artificers so having contracted and entered on their service, unlawfully to absent themselves. A similar objection applied to those counts, namely, that there was no allegation that the defendants knew that these persons had contracted. No *scienter* was alleged. The indictment, moreover, ought to have set out the contracts; it did not even allege that the workmen had entered under the contracts, or that the contracts were in writing, which was necessary: (*Lindsay v. Leigh*, 11 Q. B. Rep. 455.) Neither was the time stated during which the men were absent. It might have been for a limited time—half an hour, or even momentarily. [CAMPBELL, C. J.—It would not be material in an indictment for conspiracy for what period the men absented themselves.] The 13th, 14th, and 15th counts did not disclose any indictable offence. Those counts charged that the defendants conspired to induce and persuade the artificers to absent themselves from their service. An indictment would not lie against a man for enticing an apprentice to leave his master's service, for it is of a private nature, and to the prejudice of a single person only: (*Reg. v. Daniell*, 6 Modern, 99; *Turner's case*, 9 Q. B. Rep. 80.) So a conspiracy to persuade could not be indictable. One man may go to another and say, "I advise you to leave your master." [CAMPBELL, C. J.—It is alleged that the defendants conspired by divers subtle means and devices to induce and persuade the men to leave. Is not "subtle" a term of

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art?] No; an indictment charging a conspiracy by false, artful, and subtle stratagems and contrivances, had been held insufficient: (*Rex v. Biers*, 1 A. & E. 327.) The 14th and 15th and 18th counts alleged that the defendants conspired, by divers subtle means and devices and illegal acts and practices, and by intoxicating the men; but one man does not intoxicate another, although he may give him drink that intoxicates. Some persons are intoxicated by joy, flattery, and in other ways. The word "intoxicating" is not a word of art, nor is it employed in the statute. In none of these counts was there any reference to the statute. It was not alleged that the defendants conspired contrary to the statute. The 16th count merely alleged that the defendants unlawfully conspired unlawfully to intimidate, prejudice, and oppress the prosecutors in their trade, and to prevent the workmen from continuing to work, without alleging any acts or means used whatever. The 17th and 19th were also very general; the former merely charged that the defendants induced the workmen to depart, and the latter that they enticed and seduced them. But the case already cited showed that no indictment would lie for that: (*Reg. v. Daniell*, *supra*.) The prisoners are greatly prejudiced by the number of counts in this indictment. [LORD CAMPBELL, C. J.—The number of counts is to be strongly deprecated. I shall always use my influence against the practice of multiplying counts.] The 20th count is a summary of all the rest; but it is submitted that it shows no indictable offence. The defendants had a right to combine together for this book of wages, and say they would not work until they got it. [LORD CAMPBELL, C. J.—But they must not infringe the provisions of the 3rd section of the act of Parliament.]

Keating, Q. C. (with whom were *Skinner* and *Vaughan*), for the defendants *Woodworth* and *Gaunt*, also moved in arrest of judgment. If it is sufficient to charge the means used by the defendants simply by molesting; the count might be supported by evidence of acts which were not unlawful. Workmen had a right to persuade workmen to leave a particular master, although the effect of it would be to molest and obstruct him. The 11th and 12th counts should have stated the names of the persons who were willing to enter the prosecutor's service, or that the names were unknown: (*Reg. v. King*, 7 Q. B. Rep. 782.) In that case the indictment charged that the defendants conspired "to cheat and defraud certain liege subjects of the Queen, being tradesmen, of divers large quantities of their goods," that in pursuance of the conspiracy defendant B. fraudulently ordered and obtained upon credit from W. W. and C. W., upholsterers, divers goods, to wit, &c., of the said W. W. and C. W. (the count then stated a like obtaining on credit from other tradesmen named, and from other whose names were unknown): and that, in further pursuance, &c., and in order that the said goods might be taken in execution and sold as after mentioned, the defendants ordered the same to be delivered by W. W. and C. W., &c., at

the house of B., one of the defendants; and they were so delivered and never paid for; and in further pursuance, &c., and in order, &c., B. allowed them to continue in her house till they were taken in execution as thereafter mentioned. That the defendants, in further pursuance, &c., did falsely and fraudulently pretend that certain debts were due from the defendant B. to K. and P., two others of the defendants; and K. and P. did, to obtain payment of such fictitious debts, by collusion with B., commence actions against B.; that in further pursuance, &c., K. and P. collusively signed judgment against B. in the said actions, and issued executions thereon, by virtue of which the said goods, before the expiration of the times of credit, were taken in execution and sold to satisfy the said fictitious debts; and so the jurors, &c., found that the defendants, in manner and by the means aforesaid, did cheat and defraud the said W.W. and C.W., &c., of the said goods. It was held, by the Court of Exchequer Chamber, on error, that the indictment was bad; for that the words "alleging conspiracy" showed a design to injure, not tradesmen indefinitely, but individuals; and, therefore, either the persons should have been named, or an excuse stated for not naming them; and that the allegation of conspiracy was not aided by the overt acts, and that the overt acts themselves did not, either in connection with the allegation of conspiracy, or independently, amount to indictable misdemeanors. That objection applied to the 11th and 12th and several other counts in the present indictment, which should have set out the names of the parties or showed excuse for not doing so. The charge of conspiring to prevent hired workmen from fulfilling their contracts had reference to the statute 4 Geo. 4, c. 34, s. 3. But workmen had a right to persuade each other to leave employment, and the statute did not affect third persons. [CAMPBELL, C. J.—Then, however specifically set out, you say that it does not amount to an indictable offence.]

Keating.—None of these counts, it is submitted, show an indictable offence. They are too general: (*Rex v. Richardson*, 1 Moody & Rob. 402.) In the words of Lord Denman, C. J., in that case, the allegation is too general, and does not convey any specific idea which the mind can lay hold of to judge whether any unlawful act has been done or attempted.

Peacock, Q. C., for the defendant Duffield.—It is desirable that some rule should be laid down as to the degree of certainty necessary in indictments for conspiracy. It is laid down in *O'Connell v. The Queen* (11 Clarke & Finnelly's Rep. 233), that "the crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing: that is, to effect something in itself unlawful, or to effect by unlawful means something which itself may be indifferent or even unlawful." So it is laid down that the indictment ought to show a conspiracy to do an unlawful act, or to do a lawful act by unlawful means: (*Rex v. Jones*, 4 B. & Adol. 349.) Then comes the question, how far a count for conspiracy must show that the object was unlawful, or that the means used

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were unlawful. When the charge is of conspiracy to commit an object, which is itself unlawful, it is necessary to show that the object was unlawful, and so, if the conspiracy be to do a lawful act by unlawful means, the unlawful means must be set out with such certainty as to show that the parties would be guilty of an offence in using those means. In *Rex v. Seward* (1 A. & E. 714), Lord Denman says: "When it is said that such a proceeding is a conspiracy, because it is to be carried into effect by unlawful means, we must see in the means stated something which amounts to an offence." Here the defendants are charged with a conspiracy by "molesting." If the charge was for committing the complete offence created by the statute 4 Geo. 4, c. 34, it would not be sufficient to state it in this general way. For the complete offence, the punishment under the statute is three months' imprisonment; but for the conspiracy to commit it, the punishment is, of course, greater. Then, in a charge of conspiracy to do the act, can it be said that greater latitude will be permitted, and a more general way of describing that offence will be sufficient than is necessary in describing the offence itself? It is not sufficient to say that the defendants, by threats or by intimidating, induced workmen to leave their service, because those threats and that intimidation might be such as would not render a defendant guilty of an offence. It would be an intimidation or threat to say "you will ruin yourself and family and therefore leave;" but that would not constitute an offence within either the 4 Geo. 4, c. 34, or the 6 Geo. 4, c. 129. Another objection to the counts of the indictment charging a conspiracy to induce workmen to leave their service, was that the names of the parties were not stated. Here are certain given persons stated, divers, to wit, fifty persons, then in service, and of course their names were known, or easily ascertainable. In the case of *Rex v. The Queen* (7 Q. B. 789), already referred to, *Rex v. De Berenger* (3 M. & S. 67), was referred to in argument as a case where it was impossible from its nature to name the parties, and Mr. Baron Alderson remarked that they were a class; the individuals might become known afterwards. Mr. Baron Parke said, "The indictment there was for conspiring to injure those who should, on February 21st, purchase shares in the public funds: this indictment does not allege a conspiracy to defraud those who should sell to E. A. Birch. In a case before me at the last Norwich Assizes, parties were indicted for a conspiracy to cheat any person whom they should deal with; the conspiracy proved was to cheat A., B. and C. I thought the offences different, and directed an acquittal; and all parties seemed to acquiesce. If there is a conspiracy to injure given persons, who are unknown to the jurors, it should be stated accordingly." Here it was not sufficient to say that the persons were servants or workmen, but their names should be given. [LORD CAMPBELL, C. J.—This is a conspiracy to injure employers, not workmen. The case cited is no authority for your position.] (c) A class of counts, commencing with the 13th,

(c) Notwithstanding this observation of the learned chief justice, it may be observed, that

charged the defendants with conspiring to persuade workmen under contract to leave their service. These counts were framed on the 4 Geo. 4, c. 34, s. 3. (d) The conspiracy charged, therefore, was to induce certain persons to do that which is a misdemeanor under the act of Parliament. It is submitted that it was necessary to show that the contract was entered into after the passing of the act. This was suggested by Mr. Justice Maule, in *Lindsay v. Leigh* (17 L. J. 54, M. C.), in which a question of the sufficiency of a conviction under this statute arose. "For what appears in the information and the commitment," says his lordship, "the contract might have been made before the passing of the act." Supposing in this case the workmen had contracted, or entered into service, before the passing of the act, no offence would have been committed. The counts are also defective in not averring that the men entered as servants to serve as artificers. Nor is there an averment, as there should have been, that the defendants conspired to induce the artificers to leave their service "contrary to the form of the statute." With respect to the counts alleging that the persuading was by intoxication, it is apprehended that they are insufficient. An indictment would not be good for the commission of any act, if averred to be done by intoxicating. [LORD CAMPBELL, C. J.—Here the offence is against the prosecutors.] In the case of *Reg. v. Selsby*, tried at Liverpool before Mr. Baron Rolfe, (e) which was an indictment against several persons for a conspiracy to interfere with the trade of the prosecutors, and contained counts founded on the statute 6 Geo. 4, that learned judge told the jury his opinion was, "that if there was no other object than to persuade people that it was their interest not to work except for certain wages, and not to work under certain regulations, complied with in a peaceable way, that it was not illegal. If I am wrong, I am sorry for it; but my opinion is that that is the law. There is no evidence against Bowman, except that he was an active person at these meetings, the object of which was to persuade persons employed by Jones and Potts to seek other means of employment, and he endeavoured to persuade persons to take that view of the matter. If he and those other persons did that, and used molestation, they would come within this indictment; but if they only took innocent means to get other people to take the same view of the matter as they did themselves, it would not bring them within the indictment." [LORD CAMPBELL, C. J.—But in these cases, is leaving the service the ultimate object? The 10th count alleges, that the object was by obstructing the prosecutors and inducing and persuading the

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with the exception of the 9th, 10th, 16th, 18th, 19th and 20th counts, the *object* of the conspiracy as well as the *means* used, was alleged to be directed against the workmen, namely, to force them to leave their employment. The resulting damage certainly accrued to the employers, but it is apprehended that does not affect the question, for the certainty is necessary in respect either of the means used or of the object. If so, the case cited was strictly applicable. The argument, however, was not further pursued.—[J. E. D.]

(d) See this section referred to, *ante*, p. 476.

(e) See a note of this case, *post*.—[J. E. D.]

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workmen to leave, to force the prosecutors to make an alteration in the mode of conducting their trade. The persuasion of the men was the means, not the object.] The object is not necessarily unlawful, and the means employed are not unlawful, so that no offence is made out.

Parry (with whom was *Macnamara*) for the defendants *Peel* and *Winters*, also in arrest of judgment.—By the statute 6 Geo. 4, c. 129, s. 3, the offence is comprised in the means employed, and not the object sought to be attained. With the exception of the 13th, 14th and 15th counts, if the means used were left out, no offence was stated. The conspiracy being to do certain acts not in themselves unlawful, no offence is committed unless the overt acts are set out. The acts may be illegal, but are not necessarily so, for it is in itself no offence to persuade men to leave their work. The 6 Geo. 4, c. 129, repealed the 39 & 40 Geo. 3, c. 106. That statute had made it an offence in any journeyman, workman or other person who should, for the purpose of obtaining an advance of wages, or for any other purpose contrary to the provisions of that act, “wilfully and maliciously decoy, persuade, solicit, intimidate, influence or prevail, or attempt to prevail on any journeyman or workman, or other person hired or employed, or to be hired or employed in any such manufacture, trade or business, to quit or leave his work, service or employment.” That statute would have been applicable to the 10th, 13th, 14th, 15th and 19th counts, which employed the terms “persuading,” “enticing,” and “seducing;” but the fact of the 39 & 40 Geo. 3 having been repealed, and the 6 Geo. 4 substituted for it, which did not make use of those terms, clearly shows that the use of those means referred to did not constitute any offence now. Persuading, enticing and seducing servants, constituted no offence at common law: (*Reg. v. Daniel*, 1 Salk. 380; *Nichol v. Martin*, 2 Esp. 732; *Reg. v. Collingwood*, 2 Ld. Raym. 1116.) In *Rex v. Pywell* (1 Stark. Rep. 403), which was an indictment for a conspiracy to cheat, by selling an unsound horse, Lord Ellenborough said, that “the case did not assume the shape of a conspiracy; the evidence would not warrant any proceeding beyond that of an action on the warranty, for the breach of a civil contract. If this (he said) were to be considered to be an indictable offence, then, instead of all the actions which had been brought on warranties, the defendants ought to have been indicted as cheats.” [ERLE, J.—‘The doctrine in that case was reconsidered in *Reg. v. Kenwick* (5 Q. B. Rep. 49. (f)) In the case of *Rex v. Turner* (13 East, 228), it was held that an indictment would not lie for conspiring to commit a civil trespass upon property, by agreeing

(f) In that case the indictment charged that A. and B. conspired, by false pretences and subtle means and devices, to obtain from F. divers large sums of money of the moneys of F. and to cheat and defraud him thereof. The means of the alleged conspiracy were not stated, except as above. The indictment was held sufficient, and that it was sustained by proof that A. and B. conspired to make a representation, knowing it to be false, that horses were the property of a private person, and not of a horse-dealer, thereby inducing F. to buy them.

to go and by going into a preserve for hares, the property of another, for the purpose of snaring them; though alleged to be done in the night by the defendants, armed with offensive weapons, for the purpose of offering resistance to any endeavours made to apprehend or obstruct them.

It is submitted that all the counts of the indictment are bad for uncertainty, for they may be so construed as to disclose no indictable offence.

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Whateley, Q. C., then proceeded, on behalf of Rowlands and Pratt, to move for a rule to show cause why there should not be a new trial on the ground of misdirection, and also on the ground of the improper reception of evidence, and that the verdict was against evidence. (g) A document which might have been evidence against Peel was put in, and went to the jury as evidence against all the others. [*Whateley* then proceeded to contend that there was no sufficient evidence against Rowlands, as to which see *ante*, p. 446.]

The learned judge, moreover, did not discriminate between the counts: all were left to the jury together.

LORD CAMPBELL, C. J.—Each count is left, only the verdict is not taken on each count at intervals. Is there any objection to take the verdict on the 9th count alone, as against Rowlands?

Whateley declined to consent to that proposition. The proper mode of leaving a case to the jury was stated by Tindal, C. J., in *O'Connell's case*. The defendant had a right to have the counts put *seriatim* to the jury. Then, with regard to the placard, it was admitted as evidence against all the defendants.

ERLE, J.—I admitted it only as against those defendants, whom the evidence went to show saw and knew it was in the window.

Whateley.—It ought to have been stated to the jury that it was evidence against those only.

ERLE, J.—It is not necessary, in conspiracy, that all the acts should be brought home to each person. If there is a common purpose, which is carried out individually, that is sufficient.

Whateley.—With respect to the 11th and 12th counts, he submitted there was no evidence at all to go to the jury as against any of the defendants. Those counts should have been withdrawn from the consideration of the jury. In summing up, the learned judge said, "The first class of counts in this indictment to which your attention will be directed, is, whether these

(g) Although the questions discussed, on this part of the case, did not result in the laying down of any definite proposition of law by the court, yet they are not without their importance in ascertaining the proper issues to be left to a jury and the evidence to support them in the still very undefined law of conspiracy. The discussion, moreover, bears upon the points raised at *Nisi Prius* and previously reported.—[J. E. D.]

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defendants or any of them, combined together to prevent workmen from working for Messrs. Perry, by intimidation to other workmen. There is another class of counts very much to the same purpose; whether there is, upon the evidence, proof to your satisfaction, that they combined for the purpose of forcing this assent of Messrs. Perry, and intended to bring about that assent by intimidation to Messrs. Perry. The counts are, that they were molested or obstructed. If they intended to create alarm in the minds of Messrs. Perry, and so to force their assent to an alteration in the mode of carrying on their business, they would clearly, in my opinion, have violated the law, and be guilty on those counts. There is also another set of counts, whereby they are charged to have conspired together for the purpose of inducing workmen to leave the employment of Messrs. Perry contrary to their contracts. The charge is of conspiring to induce workmen to leave the employ of Messrs. Perry by reason of their being made drunk, and by contrivances being carried off into concealment; and I apprehend, if you are of opinion that those counts are sustained by the evidence, it will be your duty to find the defendants, against whom that is made out, guilty; and in respect of those three classes of the counts, I do not believe that there is any doubt in point of law, that the crime would have been committed. But, supposing any of the defendants are acquitted of all those classes, and you should still be of opinion that the combination was for the purpose of obstructing Messrs. Perry in carrying on their business, and so to force them to consent to this book of prices; and in pursuance of that concert, they persuaded the free men, and gave money to the free men, to leave the employ of Messrs. Perry, the purpose being to obstruct them in their manufacture, and to injure them in their business, and so to force their consent, I am of opinion that that also would be a violation in point of law. That is the class of counts in respect of which the learned counsel for the defendants have claimed a right to dispute the proposition in point of law."

LORD CAMPBELL, C. J.—The ulterior object was not the inducing the men to leave the service.

Whateley.—No doubt the object was to compel the adoption of a book of prices, but that was not an unlawful object. Another objection to the summing up is, that the learned judge said he would leave four classes of charges to the jury, but ultimately he left only three. After directing the jury in the manner stated, Mr. Justice Erle proceeded thus: "When I have taken your opinion as to these eight defendants, in respect of the three first classes of counts, in case all or any of them should be acquitted of those three classes of counts, I will then ask you, whether any of them are guilty of the concert to the extent which I have last described;" and in conclusion his lordship said, "Now with respect to those three classes of counts, as to the concert to force a book on Messrs. Perry, I say, did they intend to induce workmen who were under contracts to leave their work by being

drunk, and by taking them away? That is the first class. Did they intend to carry out the conspiracy by taking away the workmen contrary to law? Secondly, did they intend to make the workmen leave by intimidating them? Thirdly, did they intend to make Messrs. Perry come into this by intimidating them?" The fourth class of counts described by the learned judge was not left at all.

ERLE, J.—The contingency never happened.

Keating, Q. C. (for Duffield, Woodworth and Gaunt), also moved for a new trial on the ground of misdirection.—It was left to the jury, that if the object of the defendants was to obstruct the prosecutors, it was unlawful. That was an objectionable mode of leaving the case, for it was calculated to mislead the jury; for it is not every obstruction that is unlawful, and the distinction ought to have been pointed out. The case on the part of the defendants was, that they did everything they lawfully could do to force Messrs. Perry to adopt a book of prices. That was their only case. It should have been stated by the learned judge whether, that being the object, it was within the section of the act of Parliament 6 Geo. 4, c. 129.

Parry also moved for a new trial on behalf of Peel, Winters and Green, 1st, on the ground of misdirection; and 2ndly, that the verdict was against evidence. At the close of the case for the prosecution, and when it became his turn to address the jury, he objected that there was no evidence against his clients. Mr. Justice Erle said that he thought there was some evidence on the 9th count.

ERLE, J.—When I used that language, I was expressing the substantial point to you, but the 9th count did not raise the precise question. The 9th was a general count, and charged the defendants with conspiring by molesting the prosecutors, to force them to make an alteration in the mode of carrying on their business.

Parry.—It was calculated to mislead the advocate, if afterwards that distinction was not left to the jury.

ERLE, J.—I was under the opinion at the trial, and am now of opinion, that under this count evidence might have been given of attempts to force men under contracts to leave. In expressing my mind to you that there was evidence on the general count, I could not say that there was no evidence on any other counts which charged, only in other words, the very same offence.

Parry.—If Mr. Justice Erle was wrong in saying that it is an indictable offence to pay men who are under contract, with a view to force the prosecutors to adopt a certain scale of prices, and it is now held not to be a criminal offence, the misdirection cannot be got rid of by taking the verdict now on particular counts only. Another objection was, that the jury were not directed that the general object being to obtain a book of prices, it was necessary to prove that that object was accomplished or sought to be accomplished by illegal acts. If the conspiracy was

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not in the first instance to do an unlawful act, and it therefore became necessary to show that the means used were illegal, that distinction ought to have been stated to the jury: (Foster's Discourses, III. c. 1, s. 9.) To hold that every injury caused to another man would support an indictment, would be contrary to the combination act. Again, the rights of workmen were not stated in a satisfactory manner. It was the duty of the judge to point out the distinction between the object and the result. It is lawful to combine to raise wages. That combination must produce injury to some others, but that does not make it unlawful. The jury should also have been told that the overt acts of some did not bind others, although there was a common purpose to effect an object not in itself unlawful. The placard of the 20th of July, 1850, was not evidence against Winters.

Parry, 2ndly, proceeded to contend that the verdict was against evidence, and that there was no evidence against Peel, Winters, or Green on the first six counts, or on the 11th, 12th, or 18th counts, and that on the rest there was no evidence against Winters.

Cur. adv. vult.

On a subsequent day (27th November, 1851)—

LORD CAMPBELL, C. J., delivered the judgment of the court as follows:—I am sorry that my brother Coleridge is indisposed to-day, and will not be able to attend in his place, but I hope he will be here to-morrow. In the meantime, I have to state that we have had the advantage of a very deliberate consultation with him upon the case of *Reg. v. Rowlands*, and all the court who heard it, take the same view of the case. We think that upon some of the counts, viz., the 16th, 17th, and 19th, an objection may be made that they are too vague. Upon that we give no opinion at present, but we think that upon these three counts there ought to be a rule to show cause why the judgment upon them should not be arrested unless the prosecutors shall consent to enter a *nolle prosequi* as to these counts, which probably the prosecutors will be advised by their counsel may be done without at all impeding the course of justice. Then, with regard to the motion for a new trial, upon the ground of misdirection and want of evidence, we think that no ground has been made for it with respect to any of the defendants, except Rowlands and Winters. With regard to them, the learned judge (my brother Erle) at the trial thought as we think, that there was some evidence, but he intimates to us that he would be better pleased had the verdict been in their favour, and he rather summed up in their favour, and intimated to the jury that their case was distinguishable from the case of the other defendants. With regard to those two, we should be inclined to think that a rule to show cause should be granted, and, of course, if that is granted, it would give all the other defendants the benefit of a new trial, if the rule should be

made absolute; but we throw out for the consideration of the prosecutors, as the evidence against those two was slighter considerably than against the others, and as the learned judge at the trial rather intimated that he thought they ought to be acquitted, that the expedient course might be to enter a *nolle prosequi* as to them, allowing the verdict to stand as against the other defendants. If that course be adopted, then the ends of public justice will probably be satisfied according to the rules of law. I, therefore, throw out for the consideration of my brother Allen, whether he will agree to a *nolle prosequi* being entered as to all the defendants upon the 16th, 17th, and 19th counts, and whether he will agree to a *nolle prosequi* being entered upon all the counts as to Rowlands and Winters.

Allen, Serjt., on the part of the Crown, assented to the proposition to enter a *nolle prosequi* as to the three counts, but said there was authority to support them. (h)

LORD CAMPBELL, C. J.—We give no opinion that the counts may not be supported, and, if necessary, their sufficiency may be argued.

Allen, Serjt., preferred to enter a *nolle prosequi* as to those three counts, and also with respect to the defendants Rowlands and Winters, on all the counts.

LORD CAMPBELL, C. J.—That being so, we are of opinion that there ought to be no rule to show cause either to arrest the judgment or for a new trial. We are of opinion that the other counts are sufficient, and are fully supported. The principal ground of objection was that they do not set out the means of obstruction, the nature of the molestation, or what the threats were. We conceive that that is quite unnecessary. Those counts are framed under the act of Parliament, using the words of the Legislature with a view to show that the enactment of the Legislature had been violated. Those words have a legislative meaning stamped upon them, and they are evidently used in that sense by the Legislature. A distinction may be made between an indictment for the offence, or a conviction for the offence, and merely the means by which the purpose was carried out. Here the offence consists in a conspiracy (which is a common law offence) to violate an act of Parliament. We consider it quite enough to use the words which the Legislature has employed. With regard to the alleged misdirection, we are of opinion that there was no misdirection in point of law. My brother Erle gave his full sanction to the law as laid down by the counsel for the defendants, and intimated himself that it was the clear right of English workmen to make the best they could of their own labour, and to refuse to work unless upon terms that they thought were satisfactory; that each might do that, and that the whole might do it. With regard to the other defendants, setting aside Winters and Rowlands, there seems to me to be no ground whatever for saying that there was

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(h) The three counts in question were framed upon the case of *Rez v. Bykerdyke*, 1 M. & Rob. 179.—[J. E. D.]

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not ample evidence against them upon all the counts of the indictment, or that the charges against them were not fairly and fully submitted to the jury. We are, therefore, of opinion that no rule should be granted. I will add, that after the most careful and elaborate consideration of the cases, I am satisfied that *Rex v. Turner* (13 East, 228) is not law. That was an indictment for a conspiracy to go into a preserve in the night time, and armed with offensive weapons, in search of game, which in itself is an indictable offence, and an agreement to commit an indictable offence undoubtedly amounts to a conspiracy.

The rules in arrest of judgment and for a new trial were refused, a *nolle prosequi* being entered as to the 16th, 17th, and 19th counts, and generally as to Rowlands and Winters.

MR. JUSTICE PATTESON then proceeded to pronounce the sentence of the court on the defendants (i):—William Peel, Frederick Green, Charles Pratt, George Duffield, Thomas Woodworth, and James Gaunt, you have been indicted at the assizes at Stafford, or rather tried at the assizes at Stafford, on an indictment that contains a great variety of charges of conspiracy. The indictment contains as many as twenty different charges, and the jury have found you guilty on all those twenty charges—all you six; and, indeed, they found two others guilty; but those who conduct the prosecution on the part of the Crown have entered what is called a *nolle prosequi*, that is to say, that the other two defendants should be acquitted altogether, and be not further prosecuted; and with respect to three of the charges contained, out of those twenty, they have also retired from them. You are no longer to receive any judgment of this court in respect of the three charges contained in the 16th, 17th, and 19th counts of this indictment; but you are to receive the judgment of the court on the other seventeen charges. Now the law, on the subject of masters and workmen, had undergone a variety of changes in the course of the last fifty years, and, at last, an act of Parliament was passed in the sixth year of the reign of his Majesty King George the Fourth, by which it was enacted, as has been stated by one or two of the learned counsel who have addressed the court on this occasion—by which the object of the Legislature manifestly was, that all masters and all workmen should be left entirely free to act as they themselves chose with respect to the conduct of their business. The masters should be at liberty to conduct their business in what manner they pleased, and to give what wages they thought right; that the masters should be at liberty to conduct their different establishments as they thought right; that a number of masters might agree among themselves in what manner they would conduct their business respectively, and what wages they would pay. In like manner, the Legislature intended to allow that the workmen should meet together, and agree and

(i) This part of the case is given at length on account of the valuable exposition of the statute 6 Geo. 4, c. 129, by Mr. Justice Patteson.—[J. E. D.]

consider, and come to a positive agreement among themselves, on what wages they would work for, what terms they would require for their work; and they were not to be restricted from so doing merely because many of the workmen were in the employment of one person, and, perhaps, others in the employment of others. The Legislature having left both parties, therefore, intentionally quite free to make what agreement among themselves they thought fit, foreseeing, nevertheless, that it might be that much violence might be used, or much intimidation might be used, in order to carry into effect such agreement as the parties among themselves might make, enacted positively that no such violence, and no intimidation, and no molesting, and no obstructing should take place. And by that section of the act of Parliament to which the attention of the court has been directed, it is provided, that if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished; or to prevent, or endeavour to prevent, any journeyman, manufacturer, workman, or other person, not being hired or employed, from hiring himself, or from accepting work or employment from any person or persons, therefore, by either of these means, to persuade and endeavour to force any person to leave his employment, or to prevent any person from entering into employment which he would otherwise have been willing to enter into, or by violence or intimidation or molesting, to force, or endeavour to force, any manufacturer or person carrying on trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, every person so offending or aiding or abetting or assisting therein, shall be imprisoned for any time not exceeding three calendar months. That is the offence created by the act of Parliament. Most of the charges in this indictment have reference to this act of Parliament, because they are charges that you have combined and conspired together to do these very things that are prohibited by act of Parliament, that is to say, by threats, by intimidation, by molesting, by obstructing, to force workmen who were in the employment of Messrs. Perry, to leave their work; to force other persons who would have been willing to have been employed by the Messrs. Perry, not to enter into their employment, and to force the Messrs. Perry to change and alter, and make alterations in the mode of regulating and conducting and managing their business. Most of the counts of the indictment are framed on this act of Parliament, that is, a conspiracy to break this act of Parliament. Now the offence does not consist in combinations and agreement amongst the men to raise their wages; it consists in using these means that are stated in the act of Parliament to be illegal, namely, violence, threats,

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and intimidations, and molesting and obstructing, in order to produce those effects which are mentioned in the act of Parliament. In this case there is no charge in the indictment of any violence to the person or to the property of any person. There is no such charge in the indictment, nor was there any evidence of it. The charges consist of threats, intimidation, obstructing, and molesting, in a great variety of ways. Now some of you, Peel and Green, are not persons employed at Wolverhampton at all; the other four are. You, William Peel and Frederick Green, appear to be members, one of you the secretary, and the other a delegate, from an association which is said to have been formed in London, and to have existed for a great many years, the object of which, as far as we can gather it, appears to be to assist workmen in combining together, or in any steps they may take to protect what they may consider to be their rights, as against their masters. How far that is a legal association, or as to the merits of that association, I do not apprehend the court is here called on to enter into, or to give any opinion upon it, with regard to its illegality, or with regard to the mode in which it is conducted. It is said there never has been any complaint made against them. It may be so. I cannot tell. But this is plain; it must be an association, which, if they have, as they say, very large funds at their command, must be one, certainly, of a very dangerous character, and may be used for very bad and very oppressive purposes. I do not say it has been, but certainly it is one that may be so used, and there is nothing to be said in favour of persons who belong to an association of that kind, and who, of their own accord, no doubt, go down to different parts of the country, to assist workmen who have, or think they have, any grievance whatever as against their masters, and endeavour to regulate their wages. They are volunteers in that respect, and it is far better, it seems to me, for the workmen to be left to act as they themselves think proper, instead of having so powerful a body, as it seems this association must be, with the money which they are said to have at their command. However, be that as it may, the offence consists, as I have already stated, in endeavouring to do these different acts by the unlawful means stated in this indictment. Now, whether those means were used or not, whether there was originally a conspiracy to use those means or not, was a question which, by the law of this land, was entrusted entirely to the jury who tried the case. The jury, in this case, have come to a conclusion that all of you were guilty of a conspiracy to use those unlawful means in the various ways charged in the indictment, and it is impossible for the court not to see that, upon the evidence that has been detailed and read to the court on a former day, the jury had materials from which they might come to that conclusion. It was their province to determine if the charges were established or not against you; they have been fully satisfied that they were all established, and the court sees no reason to doubt the propriety of their verdict. You have made affidavits, in which you state

that no intimidation was used, that no threats were used, that you never intended to use anything of the kind, but to proceed always according to the strict letter of the law. Now it may be, that when persons enter into an agreement for a conspiracy of this sort, some of them may intend not to break the law; others may be, perhaps, in some degree of ignorance of what the law precisely is, may intend to keep just within the limits of the law. If anything can be conceived more dangerous than another, it is, that persons, having the law before them, should agree together to do certain acts so as just to avoid stepping over the limits of the law, because when those acts are carried into effect by those who agreed and conspired together to do the thing, the great probability in all cases is, that some of the agents at all events, if not all, will step over those limits, that they will do that which the law has prohibited to be done, and, when it is proved they have done that, juries universally come to the conclusion that it was intended they should do so from the beginning. I speak, therefore, of the great danger, even for persons who might really not intend to break the law, entering into any such agreement as this. Here the jury are fully satisfied that the limits of the law have been overstepped; that these different things, stated in this act of Parliament, have actually been done, and were satisfied, also, from the whole of the evidence, that they were intended to be done. We see no reason to doubt that. It has not been put as a verdict against evidence, nor can it be said to be so, for there was a great deal of evidence to that effect. One of the defendants in this case, Charles Pratt, does not appear to have taken so much part in this matter as the others, because the other defendants, George Duffield, Thomas Woodworth, and John Gaunt, on the evidence, have certainly taken a very much more active part in carrying this conspiracy into effect than Pratt; and you, William Peel and Frederick Green, being the persons who came down from London with authority, as it were in this case, certainly must be considered to have been found by the jury to have been deeply concerned in this conspiracy. It is said neither threats nor intimidations were used. Your affidavits go to that effect. If they went to contradict the verdict and find fault with the verdict, that is not now before the court. But it does not appear, certainly, by the evidence that any words of express threat were used by any one of the persons I think that are implicated in this case, nor any words of express intimidation. But no man can fail to see that there may be threats, and there may be intimidation, and there may be molesting, and there may be obstructing, which the jury are quite satisfied have taken place, from all the evidence in the case, without there being any express words used by which a man should show any violent threats towards another, or any express intimidation. There are these facts, however disclosed in the early part of the evidence, that you Frederick Green, I think, being a delegate from London, on complaint being made in respect of some person who had been discharged from the employment of Mr. Perry, you wanting to

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know if it was because he was a member of some association, were told he was discharged because his employers had no occasion for his services, and you said "If he was discharged because he was a member of an association, we have twenty thousand pounds at our command, we will stop the supplies, and you shall not have a single hand to do your work." How far it can be doubted that that might intimidate even a man of strong nerve, who had a great deal of work which he wanted to be done, and who knew and was told of the great power this association had, it was for the jury to determine; and I cannot say there may not have been great intimidation operating on the mind of Mr. Perry, from the language then used, although there was no express statement to that effect. And so again, with respect to that placard which was afterwards issued, signed by William Peel. Without going into all the language of that placard, no person can possibly read that without seeing that it contains very violent and inflammatory language; abusing very much the conduct of the masters, finding great fault with them, and as being persons who ought to be resisted and coerced in every way, and crying up the conduct of the workmen, and of the persons to whom it was addressed, as being temperate in every respect. I say that there cannot be any doubt that there was evidence from which the jury might fairly draw the conclusion that the intention was to molest, intimidate, and obstruct. Therefore there is nothing to prevent the court from passing what appears to be a proper sentence on such an indictment as this, either in respect of any doubt as to the propriety of the verdict, or as coming within the meaning of this act of Parliament. The charge is not directly under this act, because the act makes it an offence, and makes it an offence punishable by summary proceedings before a magistrate, and the charge in the indictment, as far as the offence is concerned, when proceeded for before a magistrate against persons who have committed that offence, is confined to three calendar months' imprisonment; but this is a charge of a conspiracy to do those acts, and that is an offence which is a misdemeanor, and which is punishable by our law with fine and imprisonment at the discretion of the court. The court is not confined to the time mentioned in the act of Parliament, of three calendar months, but is at liberty and is to look into all the circumstances of the case, and see what in their opinion and their judgment is the right punishment to be inflicted on parties who have so conspired. I mention that, lest it should be supposed, in the sentence I am about to pass, that the act of Parliament in any way restricted our power. Now, then, taking the whole of these circumstances into consideration, and being very willing to listen to the affidavits that have been made stating that there was no wrong intention on the part of those who have made those affidavits (although it is difficult to reconcile such an assertion with the evidence that has been produced), the court are not disposed to visit this case with more severity than it properly requires, in order that it may be a warning to others as we hope it will be received,

and particularly to the members of this association, that they should take care that they do not overstep the limits of the law in any respect. I would, moreover, say, that they should take care to keep very much within the limits, because if they do not they may depend upon it that those, with whom they are concerned, will, over and over again, overstep those limits, and cause them to be suspected, at least, of having authorized that overstepping and intending it from the beginning. The sentence, therefore, of the court for this offence on each and every of the counts of this indictment, with the exception of the 16th, 17th, and 19th, on you William Peel, Frederick Green, George Duffield, Thomas Woodworth, and John Gaunt, is, that you be imprisoned in Her Majesty's Gaol of Stafford for the period of three calendar months; and that you, Charles Pratt, be imprisoned in the same gaol for the period of one calendar month. There are seventeen charges, but do not understand me to say that you are to be imprisoned the same three months upon each of the charges contained in this indictment.

The defendants, Duffield, Woodworth, and Gaunt were then sentenced to pay a fine of one shilling on the counts on which they were convicted on the first indictment, except the 17th, on which a *nolle prosequi* was entered.

LORD CAMPBELL, C. J., subsequently said, "I must again deplore the multiplication of these counts in such an indictment, although there may be some apology for it in such a case as this, but I deplore it on account of the facility which they afford for such objections as have been raised."

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The case of *The Queen v. Selsby and others*, removed by *certiorari*, and tried before Lord Cranworth, then Mr. Baron Rolfe, at the South Lancashire Spring Assizes, 1847, referred to in the above case in *law*, but not hitherto reported, is of considerable importance in the question of how far workmen have a right to combine to produce an alteration in the rate of wages. A copy of the short hand writer's notes, supplied by the kindness of one of the learned counsel, enables the reporter to furnish a note of that case with the observations of the very learned judge in summing up the evidence to the jury.

The indictment was for conspiracy, and contained eighteen counts. The first count alleged that the defendants Henry Selsby and others (twenty-five in number), together with divers evil-disposed persons, to the jurors unknown, intending by indirect means and practices to impoverish one John Jones and one Arthur Potts (the said John Jones and Arthur Potts being then and there partners together), in their trade and business (to wit in the trade, mystery, business, and occupation of ironfounders and engineers, and carrying on business together there, to wit, at a foundry called the Viaduct Foundry in the said township and county), and to reduce to beggary and want the said John Jones and Arthur Potts, and to prevent, hinder, and deprive the said John Jones and Arthur Potts from using, exercising, and carrying on their said trade, mystery, business, and occupation, which they then and there so used, exercised, and carried on as aforesaid, on the first day of July, A. D. 1846, and on divers other days and times, next thereafter following, at the townships aforesaid, in the county aforesaid, unjustly, wrongfully, fraudulently, maliciously, and unlawfully did conspire, combine, confederate and agree together by divers indirect means and practices, to impoverish the said John Jones and Arthur Potts, and to deprive, prevent, and hinder them, the said John Jones and Arthur Potts from following, using, exercising and carrying on their said trade and business, to wit, their trade and business as such ironfounders and engineers as aforesaid."

Other counts charged the defendants with conspiring to prevent Jones and Potts from taking into their service and employment certain journeymen and apprentices, and there were two counts founded on the 6 Geo. 4, c. 129, alleging that the defendants with other evil-disposed persons, on the day and year first mentioned, unlawfully did conspire, confederate, and agree together in divers ways to obstruct and prevent the workmen and apprentices of the said John

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Jones and Arthur Potts from continuing in their employment. The fourteenth count alleged that the defendants with others, maliciously intending and devising to injure, oppress, and impoverish divers to wit, twenty workmen, journeymen, and apprentices, then and there employed and retained by the said John Jones and Arthur Potts, in the way of their trade and business, to wit, in their trade and business, as such iron founders and engineers as aforesaid, unlawfully did conspire, combine, confederate, and agree together, by divers, indirect, unjust, oppressive, and illegal means and practices, to cause to be removed, discharged, and dismissed from the service, retainer, and employ of the said John Jones and Arthur Potts, as such masters and employers as last aforesaid, the said last mentioned workmen, journeymen, and apprentices, and to prevent and hinder the said last-mentioned workmen, journeymen, and apprentices, when so removed, discharged, and dismissed from their said last-mentioned service, retainer, and employment from obtaining, securing, entering into, and continuing in any service, retainer, or employment of any person whatsoever. In some counts the intent was alleged to be to impoverish the workmen, and in others the employers.

From the evidence adduced, it appeared that all the defendants with the exception of Selsby, had been in the employment of the prosecutors, and in August 1846, a disagreement arose between the masters and the men, the latter according to the statement of the prosecutors attempting to dictate to them what men should be employed, and the number and age of their apprentices, and also insisting that no journeymen should be employed but those who were members of a certain Trades Union. The masters refusing to comply, the defendants left their employment, and pursued such a system of annoyance to the workmen who remained as to oblige them to leave, and forced others who came to be hired to leave the premises. Handbills were circulated of a similar import to those adduced on the Stafford trials, and signed by the defendant Selsby on the part of the Executive Council. One of these bills announced that a "steady picket" was placed on the prosecutor's shop. From the evidence, it appeared that this "picket" was a body of persons patrolling up and down the road adjoining the prosecutor's premises, and watching and interfering with workmen and others in the manner above stated. Documents were found upon some of the defendants tending to show a common design among the members of the Trades Union.

Rolfe, B, in summing up the case to the jury, after stating that it was one of extreme difficulty, and that although the indictment should state the charge in such a way that anybody having heard it read might be able to say, conscientiously, guilty or not guilty, implying of course that he understood what was read to him, it would be quite trifling to pretend that the defendants could have had the smallest notion of the details of the charge against them, proceeded to explain the offence charged and the law of conspiracy in general. The learned judge said "This is a charge of conspiracy to prevent Messrs. Jones and Potts from carrying on their business as they would have done from having business to attend to, and so prevent them from making profits, and then there are, as overt acts, the forming the picket, and setting it to watch, the alleged violent acts of that picket, and some conspiracies to prevent the workmen from following their employment—the one is a conspiracy against the employers, and the other a conspiracy against those parties who were anxious to be employed. In considering the case, therefore, it will be necessary that I should first shortly state what is the law upon the subject. The law certainly now on this subject, depends, I believe, entirely (that is, the law about the rights of workmen), upon the last statute (6 Geo. 4, c. 129), which has been referred to; before that statute it always having been considered, whether rightly or not, I will not now say, that masters might meet to say that they would not give more than a certain rate of wages. When I had first the honour of becoming a member of the profession, that was understood to be the law, that though the masters might meet to fix the rate of wages, the workmen might not. The masters might agree not to give more than a certain sum per day. There was a meeting of coachmakers in London, and at a variety of other places, at which that was done; but for the workmen to meet and say, we will not work unless they will give us 5s. a day, or whatever sum they might demand, that was always held to be illegal, and it struck everybody's mind as being an unjust sort of distinction. If there is to be any distinction perhaps it ought to be rather the other way, and being felt to be an injustice, the law was altered about twenty years ago. It was then modified, and now depends upon an act 6 Geo. 4, which repeals all former enactments, and provides that all enactments then in force with respect to combinations of workmen shall be repealed, and that all combinations of workmen for fixing the amount of wages, or increasing or altering the hours of labour of the workmen, or to regulate the mode of carrying on any manufacture or intercourse, shall be regulated solely by this act, and then it proceeds to enact (in the policy and propriety of which I fully concur), that after the passing of that act, if any person shall by violence to person or property, or by threats or intimidation, or by molesting, or in any way obstructing, either force, or endeavour to force, any person employed, or employer, to do anything by intimidation, he shall be liable to punishment. Perhaps the enactment does not go on to punish him sufficiently; but that is the fault of the legislature, and such is the law. Nothing is to be taken to render any meeting illegal where the object is not to work for less than a certain sum, so that the law now stands on an intelligent and rational footing. Those who are to employ labour may meet and say

'we will not give more than such and such a rate, or we will stipulate for such and such a number of hours work; we will make, in short, regulations beneficial to ourselves as employers, and we agree that we will not take any workmen that require more.' On the other hand, the workmen may meet and say 'we will not work for less than such and such sums, and if anybody thinks to employ us on low wages we agree we will not work for them, and we agree to form a fund to support one another until we get them to come to proper terms.' That being the law, the market is that, as in all other things, will find its own level, and what the value of that labour is, will be found out by there being either a redundancy of hands out of work, or a redundancy of capital seeking for labour, and that is the policy of the law. But if any illegal means be taken, the principle of the common law steps in and says that if any persons conspire and combine together to effect this illegal object, an object that is of itself illegal, any such conspiracy to effect the illegal object is itself criminal; and what the prosecutors of this indictment have done is this, they have not proceeded under the statute to indict the parties for the alleged illegal act, but they undertake to show that there was a general combination amongst them all to effect these illegal acts, and for that it is they have indicted them. That is a legal course to pursue, and being legal, I shall not now step out of the path of my duty by speculating upon the policy that has been adopted in this case. It would be, however, much more satisfactory to my mind if parties were indicted for that which they have directly done, and not for having previously conspired to do something, the having done which is the proof of the conspiracy. It never is satisfactory, although undoubtedly it is legal. First of all, you have to say whether you are satisfied that these defendants did enter into a conspiracy or combination together to violate the law in the mode which is here pointed out, by intimidation or premeditated means to prevent the Messrs. Potts from carrying on their trade. In order to show that the combination was entered into, many circumstances are given against all the defendants except three, namely, Selsby, Reed, and Bowman. The evidence is in the first place, that the Messrs. Jones and Potts, employing large quantities of workmen, those workmen did, in point of fact, begin to leave in great numbers about the month of August last, and concurrently with their so doing, or nearly so, namely in October and November, many of these rejected workmen and workmen who had left them, used to be seen walking about in the neighbourhood of the works, and the suggestion is, that they walked about in the neighbourhood of the works for the purpose of illegally (violently) obstructing, and by either threats or violence preventing persons who otherwise would be willing to work for Messrs. Jones and Potts, from working for them. There is evidence that twenty-three of these defendants, that is, all except Selsby, Bowman, and Reed, had withdrawn themselves from the employ of Messrs. Jones and Potts, and there is evidence that they were seen in the month of November walking about near the foundry. They were spoken to by the time-keeper the first witness, Enoch Monks, and he mentions every day, beginning at the 16th of November, on which they were seen. One or two were only seen once; Rolerts, I think, was only seen once; Dumbell was only seen once; Wilkinson and one or two others were only seen once, but they were seen walking about there. There is also evidence given afterwards of certain acts done. The first thing you are called upon to infer is, because they were walking about there, that they were walking about for the purpose of preventing persons coming to the foundry, and the question is, how far that is a reasonable conclusion in a criminal case. If you see persons doing nothing, it is unfair to say they were walking for an illegal purpose. A certain meeting took place early in September, at which, undoubtedly, it was stated that a picket should be formed, and two or three of the defendants were present, and it was stated that the picket should consist of the number of four. Now, I must confess, supposing it was the case that a picket was formed, it does not seem a necessary consequence that although some of the parties were found in the same boat, in one sense that they were parties to the picket—that they were acting as the picket only because they were seen with persons who were on picket. They would be out of employ, and it was very natural that they should lounge about, and the question is, whether they did more than they are proved to have done, namely that they were walking about. This observation, of course, applies with more force to those who have been only seen there once, and with less force to those who have been seen there often. It seems rather a harsh thing in a criminal proceeding to say that they were doing anything else, or that they were there in pursuance of any other objects than the acts which they performed when there. But with respect to a number of other defendants, to whose names I will now call attention, certain distinct acts done by them have been deposed to."

Mr. Baron Rolfe then proceeded to notice and comment upon evidence adduced of expressions by some of the defendants, threatening the workmen of the prosecutors, as for example, "You had better not go there, for you will not stop long;" "If you do, you shall be called a "knobstick" (meaning a man that takes another man's place for lower wages); "If you go to work there, you will repent it before the winter is over." "A great deal may be said," continued the learned judge, "as to the precise words used; what I think you must consider is, not so much the very words, as whether the fair result of it was to intimate to the person to whom it was addressed, that some bodily harm would happen to him if he persevered in his intention of working at Messrs. Jones and Potts, when they only said, "It will be the worse for you and

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you will regret it,' and so on. There are no particular words necessary to be used if the fair inference is that which has been taken, that it was to prevent the other party from persevering in the intention of working for Jones and Potts, and unquestionably that would bring home the charge of intimidation, and these parties would be guilty of conspiracy." With reference to the evidence of persuasions and inducements held out to the workmen to leave the service of the prosecutors, the learned judge said, "It is doubtless lawful for people to agree among themselves not to work except upon certain terms; that being so, I am not aware of any illegality in their peaceably trying to persuade others to adopt the same view. If it is lawful for half-a-dozen people to agree together and say: 'Why, we will not work unless Messrs. Jones and Potts raise our wages,' so it is perfectly reasonable to say to a third man 'You had better do that too' if they do not use threats to deter him from doing it; but it is not necessary to use actual threats, if the language used is such as tends to convey the impression of intimidation."

With respect to the evidence against one of the defendants named Bowman, in whose possession memoranda relative to meetings and pickets were found, the learned judge made the following observations: "That, I think, clearly shows that Bowman made part of a combination to have a picket. That, I think, is irresistible. That is a conclusion you cannot but arrive at; but you will recollect that you are now in a criminal court, as it were, and you must not come to a conclusion that the facts do not necessarily lead to; unless there be no reasonable mode of interpreting it consistently with his innocence, you must not say it necessarily implies guilt. You have it in evidence that a great quantity of people in the picket did nothing, and to some of them I think you have it in evidence from the last two witnesses, Baker and Oats, that all they used was persuasion; that they said to the people 'You had better not do it.' It appears that there must of necessity be something in the nature of a picket to watch who goes to the works, so long as there is a combination of persons maintaining those who do not go; because of necessity they must ascertain for their own security that they are not giving money to persons without ascertaining that they do not also go there and work at a lower rate of wages. Unless you come to a conclusion that Bowman was a party to a combination (conspiracy is a word that implies criminality), to achieve a certain legal object by illegal means, unquestionably he is not within purview of this indictment, and is not guilty of any crime whatever. It seems to me that it would be a rather harsh conclusion, seeing that there is nothing more in these documents than that he presided at these meetings."

Wilkins, Serjt. (for the prosecutor) interposed, and submitted that under this indictment intimidation was not necessary. He apprehended that if molestation or obstruction was used, it was quite sufficient to support the indictment.

ROLFÉ, B.—Undoubtedly, molestation would be quite sufficient.

Wilkins, Serjt.—Suppose, for instance, that a number of persons were to assemble every day around a man's shop in Liverpool, and that they should station four persons at the door to tell people not to purchase goods from that man, he apprehended that the means being illegal, the end would be illegal also; and if their object was to impoverish Jones and Potts, that would be an illegal object.

ROLFÉ, B.—"If my statement of the law is wrong, I am sorry for it. The men agree not to work for Jones and Potts except on certain terms; one is that they should employ more skilled workmen. My opinion is, that if there was no other object than to persuade people that it was their interest not to work except for certain wages, and not to work under certain regulations complied with in a peaceable way, that it was not illegal. If I am wrong, I am sorry for it, but my opinion is, that that is the law. There is no evidence against Bowman, except that he was an active person at these meetings, the object of which was to persuade persons employed by Jones and Potts to seek other means of employment, and he endeavoured to persuade persons to take that view of the matter. If he and those other persons did that, and used molestation, they would come within this indictment, but if they only took innocent means to get other people to take the same view of the matter as they did themselves, it would not bring them within the indictment."

The learned judge then proceeded to comment on other parts of the evidence.

The jury eventually returned a verdict of Guilty against some of the defendants, acquitting the rest.

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DUBLIN COMMISSION COURT.

December 5, 1851.

(Before CRAMPTON, J. and RICHARDS, B.)

REG. v. SARGENT. (a)

Practice—Evidence—Pawnbroker's lien.

When counsel for the prisoner requires the production of a bundle of articles not produced for the purposes of the prosecution, but which he conceives necessary before proceeding to cross-examine, the court will order the articles to be produced.

No matter with what bona fides a pawnbroker may have acted in advancing money on stolen goods, the court will not order the owner of the goods, after convicting the prisoner, to pay the whole or any part of the sums so advanced.

IN this case the prisoner was indicted for stealing a quantity of mercer's ware, consisting of silk handkerchiefs, shirts, linen, &c., the property of his employer, Mr. Wilson. After a number of articles had been identified by the prosecutor, and the direct examination had concluded,

Curran, J. A. (counsel for the prisoner), complained that the detective sergeant, in whose custody the stolen goods were, refused to produce a bundle, with regard to which he conceived it necessary for his client's case to examine Mr. Wilson, the principal witness for the prosecution. This bundle, which, as it appeared, contained articles Mr. Wilson had sworn to as his property before the magistrates, had been pledged previous to the prisoner entering into the prosecutor's service, and counsel was anxious to have them produced in order to test the prosecutor's accuracy.

CRAMPTON, J.—They are entitled to have this bundle produced. You must lay it on the table, and allow counsel to make use of it as he requires.

The prisoner having been found guilty,

Curran, on behalf of a number of pawnbrokers, from whose

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offices the different articles had been taken by the police, adverted to the facts which had appeared on the trial, from which it was evident that there had not been the least impropriety on their part, and called the attention of the court to the 9 Geo. 4, c. 55, s. 50, (b) as empowering the Court to order that the money advanced by them on the stolen goods should be paid by the owner who has succeeded in getting his property.

CRAMPTON, J.—I shall make no order on the matter. When pawnbrokers advance money on goods stolen in this way, not the property of the person pawning them, they must abide the consequences. I have considered this much before, and have always acted on the same principle. I would, however recommend Mr. Wilson to pay Mr. Power, the pawnbroker, whatever he has advanced on the goods pawned with him, as he was active in giving information to the authorities and bringing the prisoner to justice. I make no order, however. Mr. Wilson is to get all the articles he has identified.

(b) Corresponding English Act. 7 & 8 Geo. 4, c. 29, s. 57, in the same words.

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DUBLIN COMMISSION COURT.

December 8, 1851.

(Before CRAMPTON, J. and RICHARDS, B.)

REG. v. WALKER. (a)

Practice—Holding to bail—Prisoner.

Where a prisoner is confined in a gaol at a distance from the court-house, so that he cannot be put forward without too great a delay, the court will authorise the magistrates to take what they may consider sufficient bail.

IN this case the prisoner Walker had been sent for trial by the magistrates before the commission; but before the bills had been prepared the grand jury had been discharged. It was, therefore, impossible to proceed with his trial at the present session.

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

Curran, J. A., now applied on behalf of the prisoner that, under the above circumstances, he would be allowed to stand out on bail until the sitting of the next commission. The offence with which the prisoner was charged was a forgery of a very mitigated nature, and there could be no objection to allowing him to stand out as he would find any bail the court might think necessary.

The governor having been directed to put forward the prisoner, it appeared that he was confined at Richmond Bridewell, and had not been brought down to court.

CRAMPTON, J.—I cannot make such an order as you require, as the prisoner is not put forward. I shall make an order authorising the magistrates to take what they may consider sufficient bail, as you say they would not take on themselves to act after the prisoner had been sent before us.

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LIVERPOOL WINTER ASSIZES.

December 11, 1851.

(Before ERLE, J.)

REG. v. DEANE. (a)

Practice—Discharging jury.

A jury may be discharged by consent, after having been charged.

THE prisoner was indicted for forging the acceptance to a bill of exchange for 154*l.* 16*s.* 3*d.*

The jury had been sworn and charged to inquire into the guilt of the prisoner.

Simon, for the prosecutor, had opened the case, when

Monk, for the prisoner, having come into court during the opening of the learned counsel for the prosecution, informed his lordship that the prisoner was not prepared with his defence; upon which

ERLE, J. discharged the jury from giving a verdict, observing that, with the consent of both parties, there was power to do so, and such consent being then given, the trial was accordingly postponed to the following day. His lordship added that Mr. Baron Parke held the same opinion.

Simon and Rushton for the prosecution.

Monk and Sir George Stephen for the prisoner.

(a) Reported by T. STAMFORD RAFFLES, Esq, Barrister-at-Law.

CENTRAL CRIMINAL COURT.

DECEMBER SESSION, 1851.

(Before ALDERSON, B., and WIGHTMAN, J.)

December 18, 1851.

REG. v. BOYD. (a)

Bankruptcy—12 & 13 Vict. c. 106, s. 253—*Fraudulently obtaining goods within three months of bankruptcy.*

To obtain a conviction under the 253rd section of 12 & 13 Vict. c. 106, it must be shown that the bankrupt had obtained goods within three months of the bankruptcy, by means of a representation which he knew to be false at the time he made it, that he was carrying on business, and dealing in the ordinary course of trade, and that he required the goods for the purpose of such business. Such representation must be actually made by him.. It is not sufficient to prove that he has received the goods from a seller, who, by urgent persuasion, induced him to purchase them.

THE defendant was indicted under the 253rd section of 12 & 13 Vict. c. 106, which enacts, "That if any bankrupt shall, within three months next preceding the date of the fiat or the filing of the petition, for adjudication of bankruptcy, under the false colour and pretence of carrying on business, and dealing in the ordinary course of trade, obtain on credit from any other person any goods or chattels, with intent to defraud the owner thereof; or if any bankrupt shall, within such time and with such intent, remove, conceal or dispose of any goods or chattels so obtained, knowing them to have been so obtained, every such bankrupt shall be deemed guilty of a misdemeanour, and on conviction be liable to imprisonment, for any term not exceeding two years, with or without hard labour."

The 1st count of the indictment alleged that the defendant, on the 27th June, 1851, was declared and adjudicated a bankrupt, and that he, within three months next preceding the date of the filing of the petition, unlawfully and under the false colour and pretence of carrying on business, and dealing in the ordinary course of trade, did obtain on credit from one Martin Allephson, 150 lbs. weight of silk, with intent to defraud him of the same.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

The 2nd count was for unlawfully disposing of the said goods and chattels. There were other counts alleging similar transactions with reference to goods obtained from one James Fordati.

To prove the facts alleged in the 1st count, a salesman for Mr. Allephson was called, who stated that he went to the defendant with a sample of silk, and offered it to him for sale; the defendant approved of it, asked the price, and requested that it might be left until the next day, that he might decide whether he would take it or not. On the next day he decided on taking it. The witness, on cross-examination, admitted that he pressed defendant to buy the silk, as it was his habit to do so.

To prove the 2nd count, a silk broker was called, who stated that it was part of his business to obtain samples of silk from the different dealers, and then to go round to the manufacturers for the purpose of obtaining orders. He was paid by a commission. On the occasion in question, having obtained a sample of silk from Mr. Fordati, he went to the defendant's place of business, and showed it to him. He had known the defendant thirty years as a manufacturer in Spitalfields. He knew the defendant was making a particular article when he went to him, and the silk of which he showed him the sample, he knew was well adapted for the manufacture of that particular article. He at once told the defendant he was sure the silk would exactly suit his purpose. The defendant examined the sample very minutely, and said it was very good, and he should have no objection to purchase it. He said he wanted it to make that particular article. The price mentioned by the witness in the first instance was 28s. 6d. per pound; to this the defendant objected several times, but at last he was persuaded by witness to purchase, and he then authorized witness to go to Fordati, and buy it at the lowest price he could. The witness accordingly went to Fordati, told him the kind of article defendant was making, and for which the silk was wanted; and having purchased a bale of it, it was sent into defendant's warehouse. The price agreed on was 28s. 3d. per lb. The witness had purchased such silk of Fordati for defendant a year before. It also appeared in evidence from the bankrupt's examination, that the silk in question having been obtained from Fordati on the 9th of June, was pawned on the 11th of June for about half the value.

Clarkson (Rex with him), for the defendant, submitted that upon this evidence there was no case to go to the jury. There was no such active false pretence made by the defendant as would bring him within the meaning of the act of Parliament. He was clearly carrying on his business at the time in the regular way of trade. There was no deceit practised by him for the purpose of getting these goods into his possession. On the contrary, he was reluctant to buy them, and it was not until repeated pressure on the part of the agents that he was induced to purchase. There was no representation made by him to Mr. Fordati, nor even in the first instance to the agent, as to the purpose for which the goods were required, and the statement made by the latter to

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Mr. Fordati was not authorised by the defendant. The law under the Factor's Act might illustrate the act of Parliament under which the indictment was framed, and there, if a person disposed of property entrusted to him, and disclosed the fact before any court of law or equity previous to any indictment preferred against him, he was relieved from all penal consequences. Here the bankrupt had disclosed the whole transaction before the Bankruptcy Commissioner.

Ballantine (*Huddleston* with him), for the prosecution, contended that there was sufficient evidence for the jury to act upon. It was not necessary that the pretence should originate with the defendant nor need it be made by him in terms : (*R. v. Barnard*, 7 C. & P. 784.) If by his conduct he sought to create a false impression, and to make the agent or the principal believe that he was solvent, when he knew he was otherwise, the terms, as well as the spirit of the act, would be satisfied.

The COURT (Alderson, B. and Wightman, J.), were of opinion that the evidence with respect to the silk obtained from Allephson's was scarcely sufficient to be left to the jury, and as to that obtained from Fordati, the question ought to be left to them.

ALDERSON, B. (to the jury, in summing up.)—The main point for you to consider is what was the nature of the transaction on the 7th of June between the defendant and the broker who purchased the silk for Fordati. This is a new offence, created by a recent statute (12 & 13 Vict. c. 106, s. 253), (the learned judge read the section.) According to the whole statute law, the false pretence must have been of some existing fact which was actually or impliedly stated contrary to the truth, as in *R. v. Barnard*, referred to in the course of the trial, where a young man in the costume of a university student entered a shop, and stated that he wanted to purchase goods. There he came in the dress of what is supposed to be a rich class of society, and thereby, without positively asserting it, pretended that he was one of the persons whom the dress indicated. That was held to be a false pretence by him within the statute. With reference to the present statute, if a man falsely pretends that he is carrying on business, or by his conduct intentionally leads persons to believe that he is so carrying it on, when, in fact, he is not doing so, that is one ingredient of the offence. Another ingredient is, that some one must, in consequence of such offence, have been induced to part with his goods. The person charged must have said something, or done something, to make another let him have his property, it must be done falsely, and with intent to defraud, but the intent to defraud must, like every other intent, be inferred from circumstances. Applying this view of the law to the present case, you must first ascertain that the false representation came from the party charged, and that the prosecutor parted with his goods upon that representation. If it were not so, the words "false colour and pretence" must be held to be useless. If nothing was intended by them it would have been sufficient to say, "if any bankrupt,

within three months next proceeding the date of the fiat, or the filing of the petition, shall obtain on credit," &c. The words "false colour and pretence," then, must mean that some act must be done by the defendant by which he colourably pretends he is doing something which in truth he is not doing at the time. That is the construction my brother Wightman and myself agree ought to be put upon the language of the statute. The whole case, therefore, rests upon the testimony of the silk broker who purchased the silk for the defendant. (The learned baron read over the evidence of the witness.) The question will be whether the defendant authorised the broker to make the statement he did make to Fordati. He told the broker he wanted the silk to manufacture into the particular article referred to. He told him also to purchase it at the lowest price. Did the broker then make the communication to Fordati as the defendant's agent? If so, the defendant would be liable as far as that representation went. But you must remember that the only specific direction given to the broker was to get the silk as cheap as he could. Now, to let the dealer know that it was required for a particular purpose was not the way to induce him to lower his price. That is important in ascertaining the intention of the defendant with regard to the course the broker should pursue. Then, if you think the representation of the broker was virtually the representation of the defendant, the next question for you will be whether, at the time he authorised the broker to purchase, he did not mean to make use of the goods in his manufacture, but intended to get them into his possession that he might pledge them. If that was his object, we think the case is within the statute; but then he must have intended not to use the goods in his business at the very moment he gave the directions to the broker. As to this point, it is important to remember that they were pledged within two days of their receipt, and for a sum very considerably below their value. Substantially, then, did the defendant authorize the statement made by the broker to Fordati, that he wanted the goods to employ them in his business; and if so, did he at the time he gave the order intend otherwise to dispose of them?

Verdict, Guilty.

Ballantine and Huddleston, for the prosecution.

Clarkson and Rew, for the defence.

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DUBLIN COMMISSION COURT.

FEBRUARY SESSION, 1852.

(Before PERRIN, J. and TORRENS, J.)

February 7.

REG. v MCGOVERN. (a)

Evidence—Statements before magistrate—Parol evidence of.

It is not necessary to be clearly shown that statements, made by a prisoner on his examination before a magistrate, were reduced to writing, in order to exclude parol evidence of such statements.

IN this case the prisoner was indicted for feloniously stealing a cow, the property of Jane Kelly. There were other counts, charging a receiving and having in his possession, knowing same to be stolen.

From the evidence, it appeared that the cow had been stolen on the night of the 6th of January, from an out-house of the prosecutrix in Kilsaghan, a village about five miles from Dublin, and was sold by the prisoner at the market of Drogheda on the 30th January. The conduct of the prisoner, and the length of time spent before he sold the cow, after bringing her into the market, having got the fair market price for her, seemed to show that he was innocent in the transaction. A police constable was called to prove that he had given a different account of the manner in which he had got possession of the cow to the man to whom he sold her, and to the magistrate before whom he was taken.

J. A. Curran, for the prisoner, objected that this statement to the magistrate should be proved by the written depositions.

TORRENS, J.—There is no evidence that the magistrate took down this examination in writing; if so, why should not this constable give his testimony as to it.

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

In answer to a question from the court, the constable said he thought the magistrate took down in writing the prisoner's statement, but he was not certain.

Curran cited *R. v. Lamb* (2 Leach, 582) and *R. v. Jacob* (1 Leach 309.) Archbold states (page 137), "Until the contrary be shown, it shall be intended that the magistrate did his duty and took down the examination of the defendant in writing."

The Court yielded to Mr. Curran's objection, but seemingly with some hesitation.

Mr. *Curran* said he would withdraw his objection as he had no fear for his client, whose innocence he could prove; and the evidence was admitted.

The jury acquitted the prisoner.

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DUBLIN COMMISSION COURT.

FEBRUARY SESSION, 1852.

(Before PERRIN, J., and TORRENS, J.)

February 10.

REG. v. ROBERT DUNNE. (a)

Approver—Duty of Magistrate—Evidence.

Before admitting a person as an approver, it is the duty of the magistrate to inquire into the case and see how far such approver is mixed up with the transaction, or to what extent he would be criminally liable for his acts.

Though an accomplice, who has been admitted as an approver, may give evidence, no matter how great his own criminality, it is a wise observation that, without corroboration, a jury should be slow to convict on such evidence.

IN this case the prisoner was indicted for stealing thirty-five pounds, the property of John Bryne.

From the evidence of Bryan, the approver, who was in the service of the gentleman from whom the money was stolen, it

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appeared that the prisoner, who was a very young lad, was admitted into the house by the witness, and concealed himself in the bedroom from which the money was stolen, with the knowledge and privity of Bryan. A constable was examined, who proved that he found the money buried in the garden, where Bryan said he learned from the prisoner it had been placed by him. There was no further evidence corroborating the statements of Bryan. It was after he was arrested that Bryan informed on the prisoner.

TORRENS, J.—From what I can see of this case, this witness Bryan, who has been admitted as an approver by the Crown, is much the more criminal of the two on his own showing. He betrayed his master's confidence by admitting the prisoner into his master's house, and he saw him conceal himself there without giving any information or seeking to prevent him from effectuating what, under such circumstances, he must have well known his object to be. I regret that this witness, Bryan, has been admitted as evidence for the Crown and thus escaped being placed upon his trial. It is the duty of magistrates to be very cautious as to whom they admit to give evidence as approvers, and they should carefully inquire to what extent the approver is mixed up with the transaction, and if he be an accomplice, into the extent of his guilt. In this opinion my brother Perrin entirely agrees with me.

After summing up the evidence to the jury, his lordship continued:—

It is a wise and salutary rule that, unless the evidence of an approver be corroborated by a faith-worthy witness, although it is evidence to go to a jury, an intelligent jury will be slow to convict, without such corroboration. In this case, the only corroborative evidence you have is that of the constable, who found the money in the place where Bryan says the prisoner informed him he had placed it. It is for you to say whether this is such as will satisfy you of the truth of Bryan's evidence and the guilt of the prisoner.

The jury acquitted the prisoner.

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DUBLIN COMMISSION COURT.

FEBRUARY SESSION, 1852.

(Before PERRIN, J., and TORRENS, J.)

February 10.

REG. v. WILLIAM MURRAY. (a)

Manslaughter—Careless driving—Variance of witnesses.

If the driver of a conveyance use all reasonable care and diligence, and an accident happen through some chance which he could not foresee or avoid, he is not to be held liable for the results of such accident.

The fact that streets are unusually crowded from any public procession, or other cause, instead of excusing a driver when proceeding at his ordinary pace and with ordinary care, requires him to be particularly cautious, and may tend to render him criminally answerable for any accidents ensuing from driving at a rate, and with those precautions, which he might have ordinarily observed.

Where witnesses differ even materially as to distance and time, it should not affect their general testimony, or tend to discredit their evidence.

IN this case the prisoner was indicted for the manslaughter of Eliza Body.

From the evidence it appeared that, on the 1st of January, the nurse who had the care of the deceased, an infant, in passing from one side of the quay to the other, for the purpose of crossing Essex Bridge, was knocked down by a car driven by the prisoner, and the deceased falling from the nurse's arms under the horse, one of the wheels passed over her and caused instant death. The prisoner, it appeared was sitting on his proper driving seat and proceeding at a reasonable pace at the time the accident happened. There was some conflict of evidence as to the breadth of the

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

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carriageway and the time which intervened between the nurse leaving the footpath and the coming up of the car.

A witness for the defence swore that the nurse, when about half way across, stopped for an instant, either for the purpose of pulling her shawl over her shoulders or shifting the child from one arm to the other.

J. A. Curran, counsel for the prisoner, in addressing the jury, commented on the fact that the Lord Mayor's procession had only passed some short time before the accident happened, and that great numbers were in the streets, as showing the difficulty of avoiding an accident, and remarked that if the nurse had not hesitated or stopped for a moment, as she did, she would have escaped; and that the prisoner, not expecting but that she would have passed on at least as quickly as usual, had not thought it necessary to pull up to allow her to pass.

PERRIN, J., in charging the jury after summing up the evidence : —As to what has been urged by the counsel for the prisoner as to the crowded state of the streets, rendering it difficult to avoid an accident, I have to tell you that this unusual concourse of persons, instead of offering any extenuation for the prisoner, or diminishing the criminality of his careless driving, if you find it to have been such, would but be a circumstance to add to it, and that it was his duty, as well as of all driving upon such occasions, to take more than ordinary precautions against accidents, and to use more than ordinary diligence for the safety of the public. You may have noticed the very great variance between the statements of some of the witnesses as to distance and time, all of which cannot be correct. Wide as this difference may be, you must not conclude that they are telling wilful falsehoods, and therefore discredit their general testimony. This only shows you how men from different powers of observation and memory, may be anxious to tell, and believe they are telling, the truth, and yet give very different versions of the same transaction. The question which you have to try here is, I may say in a word, whether the death was caused by the careless and negligent driving of the prisoner, or was the result of an accident which he could not reasonably foresee or provide against.

Smylie, Q.C., and *J. Perrin* for the Crown.

The jury acquitted the prisoner.

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COURT OF QUEEN'S BENCH.

APRIL SESSION, 1852.

(Before the full COURT.)

April 15.

REG. v. JOHN MAGINNISS. (a)

Practice—Admitting prisoner to bail—Capital offence.

When the trial of a prisoner, who has been indicted for a capital offence, is postponed by the judge of assize on an application by the Crown, and such prisoner is ordered to remain in custody, this court, where the Crown counsel object, will not permit such prisoner to stand out on bail, no matter how strong a case may be made, or what amount of bail the prisoner is prepared to give.

ROSS MOORE moved for an order that the prisoner should be admitted to bail. From the affidavits it appeared that the prisoner had been indicted as an accessory before the fact to shooting at Mr. Chambre with intent, &c. The prisoner had been arrested previous to the last assizes for the county of Monaghan, but on the application of the counsel for the Crown his trial had been postponed by the judge of assize, and he was ordered to remain in custody. The only evidence against the prisoner was that a blunderbuss, which was identified as his property, had been found concealed in a bunch of rushes near the place where Mr. Chambre had been fired at on the day following that on which the attempt was made. A person, who resided near the prisoner, stated in an affidavit that the prisoner, some time previous to the attempt on Mr. Chambre's life, had complained of an armed party having come to

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

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his house and compelled him to give up his arms. The suspicious fact was accounted for in this way. [LEFROY, C.J.—You come here to try the case. There has been an order made on the subject by the proper tribunal—the judge of assize—and you are calling on us to overrule that order. MOORE, J.—The court below, if it had a proper case laid before it, would have made this order for you.] We are ready to give any amount of bail that the Crown may require, such as will satisfy them that we have no intention of flying the country. [CRAMPTON, J.—Was there an application to the court below?] No; the matter was to have been mentioned to Mr. Justice Perrin. [CRAMPTON, J.—I am afraid we can do nothing for you, unless the Crown consent.] The prisoner is a man of some respectability; he is head bailiff to Lord Charlemont's property in that county. The blunderbuss was taken away from his house twelve days before the attempt was made on Mr. Chambre. [CRAMPTON, J.—You must know, in a capital case, it is not the custom for this court to admit to bail.] This application is to the discretion of the court.

Sir *Thomas Staples*, Q.C. (with him *Edward Hayes*), for the Crown.—If this man is once liberated, we are satisfied that he would not abide his trial, no matter to what amount bail was given. We cannot consent.

No rule on the motion.

COURT OF CRIMINAL APPEAL.

January 27, 1852.

REG. v. BLAKEMORE. (a)

(Before LORD CAMPBELL, C. J., JERVIS, C. J., POLLOCK, C. B., PARKE, B., ALDERSON, B., PATTESON, J., COLERIDGE, J., MAULE, J., WIGHTMAN, J., CRESSWELL, J., PLATT, B., WILLIAMS, J., TALFOURD, J.)

Highways—Liability to repair ratione tenuræ—Conviction of privity in estate—Estoppel.

At the trial of an indictment preferred against an individual for not repairing a highway, which the indictment alleged that he was liable to repair by reason of his tenure of lands in the parish, called the "Saw-pit field," the prosecutor put in evidence a conviction, in the year 1801, of one S., a former owner of "Saw-pit field," for not having repaired, as by his tenure of "Saw-pit field" he ought, the said highway, and also showed certain repairs actually done by former owners since 1801. The defendant, in answer, showed an award and agreement, dated 1801, which found in effect, an immemorial usage for the repair of the road by the proprietors of "Saw-pit field," and that S. was liable to repair it; and it directed that he should plead guilty to an indictment for non-repair ratione tenuræ. The jury convicted the defendant, and the court reserved the question, whether the usage in respect of which the defendant was charged in the indictment was established.

Held, Platt B., dissentiente, that the question must be taken to inquire whether there was any evidence to go to the jury in support of the usage; that the conviction was clearly prima facie evidence; and Semble, that it was conclusive evidence by way of estoppel.

THE defendant was indicted at the Shropshire October Sessions, A.D. 1849, in pursuance of an order of two justices made at a special sessions for the highways in and for the division of Ford, in the said county of Salop, for not repairing two portions of a public carriage highway in the said division, the one of the length of 241 yards, and of the breadth of eight yards; and the other of the length of 249 yards, and of the breadth of eight yards, situate in the parish of Saint Chad, in the said county of Salop, which, it was alleged, he was liable to repair "by reason of his tenure" of certain lands and tenements situate in the said parish. At the Shropshire April sessions, A.D. 1851, the defendant pleaded not guilty, and the hearing of the case was thereupon proceeded with. The evidence on the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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tenuræ
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part of the prosecution, so far as the same relates to the question of law, hereinafter reserved for decision, consisted of:—First. The record of conviction upon a presentment by a justice of the peace for the town and liberties of Shrewsbury, at the April sessions, 1801 (within the jurisdiction of which court the said highway was then situate), of one William Smith, Esq., for not repairing a certain highway (which was proved to be the same as that mentioned in the indictment), “by reason of his tenure and occupation” of certain lands and tenements called the “Saw-pit field,” in the parish of Saint Chad aforesaid. The said presentment alleging that “the said William Smith, and all other occupiers of the said lands and tenements by reason of his and their tenure and occupation of the said lands, the said highway, from time immemorial, had repaired, and of right ought to have repaired, when and so often as need or occasion had required; upon which presentment the said William Smith was convicted on his own confession, and adjudged by the court to pay a fine of 1*d.*, which was paid by him accordingly. Secondly. That the highway in question was, subsequently to the before-mentioned conviction, namely, between the years 1810 and 1843, at different times repaired by the occupiers of the farm of which the lands called the “Saw-pit field” formed a part, and the expense of which repairs was repaid to such occupiers by the said William Smith during his lifetime, and by the agent of his representatives after the death of the said William Smith. Thirdly. That the said land, called the “Saw-pit field,” was, with other land, offered for sale by public auction by the representatives of the said William Smith, on the 21st August, 1840, and that the particulars of such sale contained the following statement, viz.:—“That the proprietor of Piece No. 2 (which was the Saw-pit field), is liable to the repair of 490 yards of roads near thereto, as shown in plan, which will be produced at the time of sale, and may be, in the meantime, seen at the office of the vendor’s solicitor, in Shrewsbury,” being the 241 yards and 249 yards of highway mentioned in the present indictment; and, further, that at such sale by auction, the defendant, Robert Baugh Blakemore, was a bidder for the lot which included the said piece of land. Fourthly. It was proved, on the part of the prosecution, that the defendant was the owner and occupier of the said lands called the “Saw-pit field,” formerly belonging to the said William Smith, at the time when the highway was alleged to be out of repair. On behalf of the defendant, the evidence given with reference to the question of law reserved consisted of: first, an award, dated 27th of June, A.D. 1768, of Thomas Bell, John Probert, and William Corfield, commissioners, which recites certain articles of agreement, dated 9th July, 1767, for the inclosure of a certain common or waste land, called Bickton Heath, in the township of Bickton, and whereby the said commissioners were authorised to allot the common and waste lands among the several persons having right of common

thereon. And by the said award, the commissioners did allot to John Hollings, as proprietor of lands and tenements with common to the same belonging, a parcel of land marked No. 13, containing by measure two acres, four roods, and twenty-seven perches, and bounded as therein described, which piece of land was admitted to be the same as that called the "Saw-pit field" in the before-mentioned conviction. The said award then further proceeds to state, that the commissioners, had further ascertained, set out, and appointed through the lands intended to be inclosed (*inter alia*), one public horse, carriage, and drift road, over the east end of the common, which road was admitted to be the highway mentioned in the present indictment. The said award then contains the following provisions, "And the said public horse, carriage, and drift roads, being now very ruinous and threatened to be indicted, we the said Thomas Bell, John Probert, and William Corfield, further award, order, direct, and appoint, that the same shall be forthwith repaired, and for that purpose that the sum of 50*l.* shall be raised by the said several proprietors in the space of one month from the date thereof in the proportions mentioned in the schedule annexed, and paid into the hands of Mr. Thomas Wright, and Mr. William Probert to be employed as aforesaid, and that whatever further sum of money shall be wanted to complete the repair of the said roads shall be raised in the like proportions, to be paid in one month after demand, by the said proprietors into the hands of the said Thomas Wright and William Probert, or any other person appointed to receive the same, and be employed for the purpose aforesaid. And we do also award that the said public roads shall be at all times for ever hereafter repaired, and kept in repair by and at the expense of the said proprietors, in the like proportions, and that the money to be raised for that purpose shall be paid into the hands of the surveyor of the highways, or such other person or persons as shall be from time to time appointed by the said proprietors, or the major part of them, for that purpose. Secondly. Articles of agreement, dated 1st June, A.D. 1797, between John Mytton, Esq., and the said William Smith and several other parties, proprietors of land in the said township of Bickton, reciting the before-mentioned articles of agreement of the 9th July, A.D. 1767, and the award of the 27th June, A.D. 1768, and that the commissioners did allot the lands and set out the roads thereinafter mentioned, and that the said William Smith was then the owner of the lands allotted by the last-mentioned award to John Hollings, being No. 13 on the plan, and further reciting as follows:—"And whereas the said several public ways or roads ascertained, set out, and appointed in and by the said award, as hereinbefore mentioned, being very ruinous and in bad repair, and a difference or dispute having arisen or taken place between the inhabitants in general of the parish of St. Chad, in the said county of Salop, in which the same roads are situate and being, and the owners and occupiers of the said several

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pieces or parcels of land enclosed by virtue of or under the said recited articles of agreement, whether the said last-mentioned roads should be repaired and kept in repair by and at the expense of the said parish in general, or by such last-mentioned owners and occupiers, in exclusion of the rest of the parishioners of the same parish, it was agreed by and between the parties interested therein, that the said difference or dispute should be left to the determination of Thomas Plumer, of Lincoln's-inn, Esq., and Hugh Leycester, of the same place, Esquire, and that their opinion and determination in the premises should be final and conclusive. And whereas by a certain instrument in writing under the hands of the said Thomas Plumer and Hugh Leycester bearing date the 12th day of August, A.D. 1794, they the said Thomas Plumer and Hugh Leycester, declared themselves to be of opinion, that the said parish of St. Chad was not bound to repair the roads in question, the proprietors of the enclosed lands being liable to repair the same, according to the proportions mentioned in the said award. And they directed that the roads in question should be divided by the said John Hall into distinct parts, corresponding to the proportions above mentioned, having regard to the condition of the said parts, and the expenses of repairing the same, and the convenience of the several proprietors, which said several parts should at all times thereafter be separately repaired by the respective proprietors, and that separate indictments should be presented against each proprietor, describing accurately the part which the proprietor was to repair, and the lands in respect of which he was liable to repair the same, to which indictments the said several proprietors should plead guilty and should execute an award, to be thereafter more accurately drawn up by the said Thomas Plumer and Hugh Leycester, to ascertain the part of the road which each proprietor was thereafter to repair for ever. It was witnessed that for carrying into effect the said award, and for other good causes and considerations then moving, they the said John Mytton, William Smith, and others, did for themselves, their respective heirs, executors, and administrators, mutually covenant and agree with each other as thereafter mentioned. And the said William Smith, for himself his heirs, executors, and administrators, did covenant, promise, and agree that he, his heirs and assigns, or the owner or occupiers for the time being of the piece or parcel of land allotted to the said John Hollings (being the piece of land called Saw-pit field aforesaid), should and would from time to time and at all times thereafter repair and keep in good order and repair, certain portions of the road which were proved to be the part of the highway mentioned in the indictment. The case was submitted to the jury, who were directed to consider whether the highway was an ancient public highway; whether the usage in respect of which the defendant was charged had been proved; whether the defendant was the occupier of the Saw-pit field at the time mentioned in the indictment; and whether the highway was, at such last-

mentioned time, out of repair? The jury found the defendant guilty. It having been contended, on the part of the defendant, by his counsel, that the documentary evidence produced on his behalf, had disproved the usage mentioned in the indictment, and the counsel for the prosecutor having contended that, notwithstanding such documentary evidence, such usage was established by the conviction of the said William Smith, and the subsequent repairs by the occupiers of the land owned and held by the defendant, the Court, in its discretion, deemed it right to reserve the question of law for the consideration of Her Majesty's justices and barons of the Courts at Westminster, viz.: Whether, upon the evidence hereinbefore set forth on the part of the prosecution, of the conviction of William Smith, the former occupier of the land in question called the "Saw-pit field," and of the repairs of the road indicted by the said William Smith, and other occupiers of the land, and the evidence on the part of the defendant of the award of the 27th of June, A.D. 1768, and of the articles of agreement of the 1st of June, A.D. 1797, the usage or liability in respect of which the defendant was charged in the indictment, was established. If the Court of Appeal should be of opinion that the usage charged in the indictment was established, the conviction to be confirmed; if otherwise, reversed. The judgment of the Court of Quarter Sessions was postponed, and the defendant entered into recognisance to appear and abide the judgment of the court when called upon.

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Argument.

The case was first argued (Nov. 15) before Lord Campbell, C.J., Maule, J., Platt, B., Talfourd, J., and Martin, B., by Kenealy, for the defendant, and Scotland, for the Crown, but the court desired that it should be re-argued before all the judges.

Kenealy, for the defendant.—The question which ought to have been left to the jury is not whether a conclusive answer had been given to a liability *primâ facie* shown; but whether a conclusive case had been shown by the prosecutor, for it is sought to make an individual liable, and the *primâ facie* evidence, which would be enough in the case of a parish, will not do. Reliance is placed on the record of a conviction of Smith, but if the case were sent back to have that record stated at length upon it, it would appear to be erroneous.

LORD CAMPBELL, C. J.—We cannot travel out of the case.

PARKE, B.—If you can show that which is before the court to be void, you may do so; but that which is only open to reversal on error, is binding in the mean time.

Kenealy.—If it contains a number of errors, and the court can see that it does, why should it not be attacked?

LORD CAMPBELL, C. J.—If the record as set out is necessarily a nullity, it ought not to weigh against the defendant.

Kenealy.—The 24th section of the 13 Geo. 3, c. 78, empowers magistrates to proceed on their own view or on information; this is by presentment.

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LORD CAMPBELL, C. J.—It is quite clear from the case that the record may be valid.

PARKE, B.—You must show affirmatively that the record is invalid.

MAULE, J.—We must proceed on the case, and questions reserved.

Kenealy.—The record of conviction is no more than an admission by Smith, and therefore may be explained and shown to have been made by mistake.

LORD CAMPBELL, C. J.—The defendant was privy in estate with Smith.

Kenealy.—There was not any proof of immemoriality, for the conviction was obtained pursuant to the award of 1768, and the agreement of 1797, the latter of which does not admit any immemorial liability, while the former was really a fraud on the public.

LORD CAMPBELL, C. J.—Mr. Plumer and Mr. Leycester seem to have thought that a conviction would settle the matter in *secula sæculorum*.

Kenealy.—No doubt; but such a conviction is a fraud on the public. Here is a private agreement by which a parish is to be exonerated from its common law liability; and the parties who affect to exonerate, assume without an Act of Parliament to parcel out a common. That is illegal by the Statute of Merton. He cited *R. v. Scarisbrick*, 6 Ad. & E. 509.

Argument.

Scotland, *contrà*.—The question reserved for the opinion of the court is, whether there was any evidence for the jury of a prescriptive liability. It is clear from the direction to the jury that it must have been so.

LORD CAMPBELL, C. J.—The direction was unexceptionable.

Scotland.—Then there was a *primâ facie* case.

LORD CAMPBELL, C. J.—No doubt as to that is entertained by any of us, but was it answered?

Scotland.—On the contrary, the defendant's evidence was quite consistent with it. The award and the agreement presuppose, not only the immemoriality of the tenure, but of the allegation to repair. The road was not there for the first time then.

LORD CAMPBELL, C. J.—It was clearly there long before.

Scotland.—The state of things was probably this, the proprietors and not the parish were bound to repair the roads on the common, and the liability of any one was in respect of all the roads, and the whole of every one of them; they, therefore, agreed to apportion the liability among themselves. There was, therefore, evidence of immemorial usage, and of the defendant's liability *ratione tenuræ*. Were it otherwise, however, the defendant was estopped by the conviction of Smith, through whom he claims: (*R. v. St. Pancras*, Peake, N. P. 219.)

Kenealy replied.

LORD CAMPBELL, C. J.—I am of opinion that this conviction must be affirmed. I hope I am not influenced in forming this opinion by the somewhat sharp attempt of the defendant to get rid of a liability, of which he had full notice when he purchased the

property. The questions left to the jury by the chairman were: (His lordship read them.) No fault can be found with the manner in which the case was put to the jury; no judge in Westminster-hall could have placed the matters for their consideration more correctly before them. The jury found all these questions in the affirmative. The question presented to us is, was the usage established? Nor can it be said that a *prima facie* case has not been established. The conviction of William Smith, with whom the defendant is a privy in estate, was given in evidence, showing that he was bound to repair the highway *ratione tenuræ*, which was followed by a long train of evidence, establishing a strong *prima facie* case to go to the jury. If the question had been put to us whether the conviction of Smith was not conclusive evidence by way of estoppel, I should have been strongly inclined to have answered in the affirmative, according to the case of *Rex v. The Inhabitants of St. Pancras*. It would have been an estoppel if pleaded, but there was no opportunity of pleading it, the defendant having pleaded not guilty. If there be an opportunity of putting an estoppel on the record, and it has not been embraced, it is not conclusive; but if no such opportunity of pleading the estoppel has been given, it may be conclusive. But I waive the point altogether, for I think the defendant has given no answer to the case proved on the part of the prosecution; for consistently with the evidence for the defence, this may have been a highway which the owner of the Saw-pit field was liable *ratione tenuræ* to repair, and it is open to us to draw the conclusion that the owner of that field is liable to repair it. Judgment.

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JEEVIS, C.J.—I concur in thinking that the conviction is right. I do not go into the question of estoppel, as it does not appear to me to be raised; the question seems to me to be, whether or not there was evidence to go to the jury; the question of its value as evidence is not left to us. I think there was. Before the articles of agreement, ancient roads existed; by whom they were to be repaired was uncertain; the parties inquired into their rights, and the owners agreed that they must consider themselves liable; a presentment was preferred against Smith; and he acquiesced in the conviction, and subsequently repairs by him were proved. It cannot be said, therefore, that there was not evidence for the jury.

POLLOCK, C.B.—I am also of opinion that the conviction was right. There is no objection to the direction of the chairman of the sessions to the jury. In point of law it is right. The question is, was there evidence for the jury, of which I entertain no doubt; I therefore think it unnecessary to consider the question of estoppel.

PARKE, B.—I think the conviction is right. The question is, whether there was evidence to go to the jury, of the defendant's liability to repair the road, *ratione tenuræ*, and I am of opinion that there was. But I go further, and I think that the conviction was an estoppel on the authority of the case cited, and on the following

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cases?—*Treviban v. Lawrence* (2 Ld. Raym. 1051; 1 Salk. 276); *Speake v. Richards* (Hobs. 206); *Magrath v. Hardy* (4 Bing. N. C. 782); *Armstrong v. Norton* (2 Ir. Law Rep. 100.) If, instead of pleading not guilty, the defendant had pleaded that he was not liable to repair, *ratione tenuræ*, and the prosecutor had replied, for he would have had to reply, the conviction against Smith might have been pleaded by way of estoppel; but as he pleaded the general issue, there was no opportunity of pleading the conviction as an estoppel. Lord Chief Justice Holt in the case of 2 Lord Raym. 1051, says, "But if the defendant had pleaded *nil debet*, the plaintiff might have taken advantage of the estoppel on the evidence, because the pleadings are not brought to such a point in the case as to give the plaintiff the opportunity of replying the estoppel." I think, therefore, that here there was not only evidence to go to the jury, but conclusive evidence.

Judgment.

ALDERSON, B.—I think that it was the duty of the chairman to have told the jury that the case for the prosecution was conclusively proved. The award was made by persons who were to ascertain and set out the road. That they set out a road without power to do so under an Act of Parliament, is rather an argument in favour of an existing road, and an existing liability to repair it, *ratione tenuræ*. Both Messrs. Plumer and Leycester find that the parish was not liable, which must be wrong if the road was a new one, but which is right if there was an obligation to repair the road *ratione tenuræ*. There was nothing in the defendant's evidence inconsistent with the evidence for the prosecution. I also agree with my brother Parke, that the conviction was an estoppel.

Patteson, J., Coleridge, J., Maule, J., Wightman, J., Cresswell, J., Williams, J., and Talfourd, J., concurred.

PLATT, B.—I am sorry to say that I do not quite concur with my learned brethren. I do not agree that the question put to us is to be read as meaning, whether there was evidence for the jury. If, indeed, we are so to construe it, I cannot doubt but that there was evidence. The question put by the sessions is, whether the usage or liability, in respect of which the defendant was charged in the indictment, was established. This looks to me like a question of fact; and I think that the liability was not established. There is no evidence of any repairs having been done to the road before the award was made by any of these parties to the award or of any liability existing in them. The articles of agreement and award cannot fix upon the parties a liability to repair *ratione tenuræ*. If these facts enable us to see what the origin of the liability was, how can we say that they establish the prescriptive liability to repair? With regard to the question of estoppel, it seems to me that the prosecutor abandoned the effect of the conviction, for he did not set it up as an estoppel at the time, but he let in the evidence of the defendant. The matter, therefore, was left at large, and I think the jury were at liberty to find according to the facts.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 24, 1852.

REG. v. GREENWOOD. (a)

*Misdemeanor — Uttering counterfeit coin — Absent participator a principal.**If two persons are engaged in the common purpose of uttering counterfeit coin, and, in pursuance of that purpose, one, in the absence of the other, puts off some pieces of the counterfeit coin, both may be convicted as principals, an absent participator in misdemeanor being a principal.**R. v. Else (R. & R. 142); and R. v. Page (1 Russ. on Cr. 82), overruled.*

THE following case was reserved by Talfourd, J. :

The prisoner, William Greenwood, and one Johnson, were tried before me, at the last assizes for the city of Exeter, for a misdemeanor in knowingly uttering a counterfeit shilling. The evidence proved that the uttering charged in the indictment was effected by the prisoner Johnson in the absence of Greenwood; but that both prisoners were together before the uttering, each offering counterfeit shillings of the same description with that uttered by Johnson; that they both brought food, purchased with the proceeds of such utterings, to a common lodging; and that Greenwood was taken on the same evening with a counterfeit shilling of the same mould in his possession, and with eight good sixpences and five fourpenny pieces; which left no doubt of their joint engagement in a common purpose of uttering base shillings and sharing in the proceeds. As to Johnson, the case was without doubt; as to Greenwood, I directed the jury, that if they thought he was engaged in the evening in question with Johnson, in the common purpose of uttering counterfeit shillings—having one stock of such coin—for their mutual benefit; and if, in pursuance of such purpose, Johnson uttered the shilling, they ought to find Greenwood guilty, subject to the question of law which arose on the facts, as to the necessity of the actual presence of Greenwood, or so near neighbourhood as to amount to association in the very act, in order to support the charge. The jury found both prisoners guilty, and I sentenced both to six months' imprisonment and hard labour; but, in deference to the

(a) Reported by A. BITTLETON, Esq., Barrister-at-Law.

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authority of the case of *Rex v. Else* (a) (Russ. & R. C. C. R. 142), and the opinion of Mr. Justice Coleridge, in *Reg. v. Page* (b) (1 Russ. on Crimes, 82), I reserved the question whether Greenwood was properly convicted for the judgment of the Court of Criminal Appeal. The prisoner was undefended; but though, in the absence of authority, I should have thought it clear that, in a case of misdemeanor, an absent participator is a principal, I thought it right to reserve the question, which is—whether Greenwood was properly convicted?

The case was not argued by counsel.

POLLOCK, C.B.—We are all of opinion that Greenwood was properly convicted. There was, unquestionably, evidence of his being a participator in the offence; and, in the case of a misdemeanor, an absent participator is a principal.

PARKE, B.—It is quite right that both the prisoners should be convicted upon this indictment. In misdemeanor, all persons who are accessory before the fact may be indicted, or treated as principals, though they should be absent at the time when the offence is actually committed. My brother Talfourd reserved this case in deference to the opinion of my brother Coleridge, in *Rex v. Page*, and to the authority of the decision in *R. v. Else*; but the observations of Mr. Greaves (c) upon those cases

Judgment.

(a) *R. v. Else*.—The prisoners Job and Sarah Else, were indicted for uttering a bad shilling, having other bad shillings in their possession at the time. Upon the evidence it appeared that the uttering was by the woman alone, on the 30th of January, in the absence of the man; that they both slept together on the 29th and 31st, and that on the 30th the man offered for sale a large quantity of bad shillings and sixpences, and also that they were both searched on the 31st, when upon the man was found a large quantity of bad shillings, and upon the woman six bad shillings. The prisoners were both convicted of the double offence, on the ground that both being engaged in the same illegal traffic, the act of one was the act of both; but upon the case being reserved, the judges held the woman alone liable to be convicted, and that of the single offence only.

(b) *R. v. Page*.—Page and Jones were indicted under 2 Will. 4, c. 34, s. 7, for uttering counterfeit half crowns, twice on the same day; and it appeared that they were seen at different times in the morning together, and that Page went into an inn, leaving Jones about twelve yards off in the street, whilst Page passed one half crown in a room which was out of the sight of Jones; Page then came out, joined Jones and they went together to another inn, where Jones went in and passed another half crown, leaving Page standing about twelve yards off in the street, and out of sight of where Jones passed the half crown. Mr. Justice Coleridge said he thought the true principle was to ascertain whether the one prisoner was so near to the other as to help the other to get rid of the money, which he did not think the evidence proved in this case. The jury convicted both.

(c) The following is Mr. Greaves' note to the case of *R. v. Page and others*: "I suggested in this case that *R. v. Else* had proceeded on a fallacy. It was considered in the same light as a felony, and the rule as to principal and accessory applied to it, which was erroneous, as it was a misdemeanor, and therefore all persons taking part in it were principals though absent. The learned judge made no direct attention to this suggestion, which seems to me to deserve consideration; the rule is that in misdemeanors all persons concerned therein are principals (*ante* p. 33; 4 Bl. Com. 36; 1 Hale, 613; 12 Co. 81; Dalt. c. 161; 2 Inst. 183; Co. Litt. 57; Foat. 72; *Baker v. Rogers*, Cro. Eliz. 788), and whatever would make a person accessory in a felony makes him a principal in crimes where there are no accessories. It has been so held in treason: (12 Co. 81; Stamf. P. C. 40.) In all these cases of uttering the evidence would certainly have satisfied the jury if the case had been a felony, that the party absent was an accessory, and therefore it should seem he was a principal in the misdemeanor. If that be so, the indictments charging with the actual uttering were right, because that is charging according to the legal effect of the offences. In 12 Co. 81, it was held that if one before the act done procure another to counterfeit the great seal, in the indictment he may be charged with the fact, viz., the counterfeiting. Unless therefore, the misdemeanor of uttering base coin is to be

are entitled, I think, to great weight; and it seems that the decision in *R. v. Else* arose from the judges not adverting to the distinction between misdemeanor and felony. The cases referred to in *R. v. Else*, viz., *R. v. Soares* (R. & R. 25), and *R. v. Davis* (*ib.* 113), were cases of felonious forgery.

ERLE, J.—The principle on which the learned judge acted at the trial is, I apprehend, one of universal application; that all persons who are concerned in the commission of a misdemeanor are principals; and, according to that rule, this conviction is right.

TALFOURD, J.—I should have felt no doubt in this case but for the authorities which have been mentioned; if the law was otherwise, it would be impossible to convict an absent utterer at all.

CREMPTON, J.—I think that the old authorities having proceeded upon a forgetfulness of an important principle, it ought to be overruled.

Conviction affirmed.

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REG. v. BALDRY. (a)

Evidence—Confession—Admissibility—Inducement or threat.

A constable, upon apprehending a prisoner on a criminal charge addressed to him these words: "You need not say anything to criminate yourself. What you do say will be taken down, and used in evidence against you:"

Held that those words did not import any threat or inducement to the prisoner; and that a statement made by him subsequently was admissible as evidence against him upon his trial. R. v. Drew, 8 C. & P. 140; R. v. Morton, 2 Moo & Rob. 514; R. v. Furley, 1 Cox C. C. 76; and R. v. Harris, ib. 106, overruled.)

THE following case was stated by the Lord Chief Justice of the Court of Queen's Bench:—

"At the last assizes for the county of Suffolk, the prisoner was

distinguished from all other misdemeanors, these cases deserve consideration, and the more so because if they are good law the utterer alone can be convicted, while the party in the distance who generally is the more guilty, will altogether escape. He cannot be convicted as principal because he is absent, nor as accessory because in misdemeanors there are no accessories. In *Reg. v. Roderick* (7 C. P. 798), Mr. Baron Parke expressly declared that when an offence was made a misdemeanor by statute it was made so for all purposes, and surely there can be no good reason for introducing an exception, the effect of which is to give perfect impunity to guilty parties. The only cases referred to in *Reg. v. Else* were *Reg. v. Soares* (R. & R. C. C. R. 25); and *Reg. v. Davis* (*ibid.* 113), both cases of felony."—[C. S. G.]

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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tried before me upon an indictment charging him with having administered poison to his wife, with intent to murder her.

"On the part of the prosecution, a police constable was called, whose evidence thus began :—' I went to the prisoner's house on the 17th December. I saw the prisoner. Dr. Vincent and Page, another constable, were with me. I told him what he was charged with ; he made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said *he need not say anything to criminate himself ; what he did say would be taken down, and used as evidence against him.*'

"Objection was made on behalf of the prisoner, that what he then said was not admissible.

"I thought that, although the caution of the constable differed from that directed by 11 & 12 Vict. c. 42, s. 18, to be given by the justice to the prisoner in the word 'will,' instead of 'may,' it did not amount to any promise or threat to induce the prisoner to confess ; that it could have no tendency to induce him to say anything untrue ; and that in spite of it, if he did afterwards confess, the confession must be considered voluntary, I therefore allowed the witness to give in evidence what the prisoner then said, which amounted to a confession of his guilt.

"But as doubts have been entertained by learned judges whether a confession, after such a caution, may lawfully be given in evidence, I reserved the question for the Court of Criminal Appeal.

"The prisoner was convicted, and sentence of death was passed upon him."

Argument.

Henry Mills, for the prisoner.—The question is, what effect those words were calculated to produce on the mind of the prisoner, when he was so addressed by a constable, and informed of the consequence of making a statement. If they held out to him the assurance of any worldly advantage to himself in regard to the charge, as the consequence of making a statement, or of harm, as the consequence of refraining from doing so, any statement made on the strength of them would be inadmissible in evidence.

LORD CAMPBELL, C.J.—Yes ; that is the question.

Mills.—The law presumes that a statement made on the strength of such an inducement will be untrue. It may be a false charge against the prisoner, and therefore is inadmissible in evidence.

SIR F. POLLOCK, C.B.—The law does not presume it to be untrue, but only dangerous to be left to the jury.

Mills.—It will be unworthy of judicial knowledge, and inadmissible in evidence. The law in regard to the practice in criminal matters in early times is barren of authorities, and rests on tradition. The earliest reference to principle in regard to the receivability in evidence of confessions, is one to Hardres' Reports, p. 137, in Gilbert on Evidence, p. 123 (Sedgwick's ed.) ; and it would seem that the present law on the subject is none other than

an application of the general maxim, *nemo tenetur prodere seipsum*. It is now a common doctrine that a confession, to be admissible, must be free and voluntary; that it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, or by the exertions of any improper influence: (2 Russ on Cr. 826.) And, further, that the law will not measure the force of the influence, or decide upon its effect, upon the mind of the prisoner, and will therefore exclude the declaration, if any degree of influence has been exerted: (*ibid.*) The law is suspicious of confessions; it suspects that it does not get at the truth as to the way in which they were obtained. They are said to be the weakest and most suspicious of all testimony, very liable to be obtained by artifice, false hopes, promises of favour, or menaces, seldom remembered accurately, or reported, with precision, and incapable, by their nature, of being disproved by other negative evidence: (4 Black. Com. 357.) In the spirit in which the law on this subject has come down to us, not only ought it to be supposed that a prisoner, in making a statement, has done so on the strength of an inducement, if any ever so slight has been held out, but, in the consideration of whether words used towards him may be interpreted to convey an inducement, he is entitled to have them construed as doing so, if by possibility they can be so construed: (*Rex v. Williams*, 2 Russ. on Cri. 832.) "Too great chastity cannot be observed on this subject:" (*Per cur. Thompson's case*, 1 Leach, C. C. 291.) Saying to a prisoner, "it would be worse for him if he did not confess, or better if he did," is sufficient to exclude a confession, according to constant experience: (2 East, P. C. 659.) Saying to a prisoner, "I am in great distress about my irons; tell me where they are, and I will be favourable to you," excluded the prisoner's statement: *Oass's case*, 1 Leach C. C. 293. (a) So also did the words, "you had better split, and not suffer for all of them:" (*Reg v. Thomas*, 6 C. and P. 353.) So also did the words "no doubt thou wilt be found guilty; it will be better for you if you will confess:" (*Sherrington's case*, 2 Lewin, 123.) So did the words, "you had better tell the truth, or it will lie upon you, and the man go free:" (*Rex v. Enock and Mary Pullen*, 5 C. & P. 539.) So did the words, "you are under a suspicion of this; you had better tell all you know:" (*Rex v. Kingston*, 4 C. & P. 387.)

SIR F. POLLOCK, C. B.—You need not cite cases that are familiar. Confessions have been excluded where the prisoner has been told it would be better for him to tell the truth, or worse for him if he did not,—whenever there is an express assurance that it will be better or worse.

Mills.—Even impressing a man with the fact that the prosecutors are sure of his guilt; alarming him, so as to make him throw himself on their unpromised mercy, is enough to exclude. Saying to a man, "It's of no use for you to deny it, for there is a man and a boy will swear they saw you do it," excluded the prisoner's statement; it is an inducement to say something; what

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the prisoner said, therefore, is not admissible. Per Gurney, B., *Reg v. Mills* (6 C. & P. 146). So also did the words "it's of no use for you to deny it." *Reg v. Warringham* (15 Jur. 318), decided by Parke, B. Take the words used to the prisoner first, as meaning that whatever he said would be used in evidence, and used against him. Thus construed, the words are a threat, they imply that an exculpatory statement will be a lie, and therefore an aggravation of guilt, and under the dread of exasperating the prosecutors, the prisoner may have been tempted to throw himself on their unpromised mercy; they drive him to a statement, and one of a character to fall in with the mood of those who address him.

LORD CAMPBELL, C. J.—I cannot see that the words were a threat.

PARKE, B.—I have sent for my notes of the case of *The Queen v. Warringham*. My note, is, that the words used were, "that it would be better to confess." The object of the report was not to show what words amount to an inducement, but that where words of inducement were used, and it is doubtful whether they were used before or after a statement, that the prosecution must clear up the doubt, and show that they did not precede the statement.

Argument.

Mills.—That is so, and your lordship's correction of the words of inducement used in that case renders it inapplicable to the point for which I adduced it. The words, however, are not to be considered as a threat. I rely on their literal signification taken in their plain and literal sense, and, construed in the only way in which they can be construed without reading them as a threat, or as involving an absurdity, they hold out an assurance of advantage to the prisoner in regard to the charge, which renders the statement made on the strength of them inadmissible in evidence. They mean, what you say will be taken down and used as evidence against you, "as," that is to say, *in like manner as* evidence against a prisoner; in other words, they will be used at the trial: "as" is a word of similitude. It cannot be that the prisoner's statement would necessarily be something the effect of which would criminate him, and so be evidence against him; his statement might have been a detailed exoneration of himself. The words are certain in telling the prisoner that his statement would be used, and he is entitled, not only by a favour due to him by law on the occasion, but also according to the rational interpretation of the words, to have "as evidence against him" construed to mean "*in like manner as*;" for otherwise the words, if not a threat, import an absurdity. The accused man sat with his face in his handkerchief, weeping, when the words were addressed to him: had shown no intention of speech; his situation was one to invite pity; and the words "as evidence against" were prefaced with words of comfort. He was told, "you need not say anything to criminate yourself." In effect he was told, "speak if you like, nor need you criminate yourself; what you like to say, however,

shall be used at your trial ; be warned, therefore, to say nothing against yourself." In *The King v. Drew* (8 C. & P. 140), the prisoner was told "not to say anything to prejudice himself, as what he said would be taken down, and would be used for or against him at his trial." Mr. Justice Coleridge held this to be an inducement, and that the prisoner's statement could not be received in evidence; nor is this to be considered as a hasty decision. In *The Queen v. Morton* (2 M. & R. 514), the prisoner was told by the constable who apprehended him, "What you are charged with is a very heavy offence, and you must be very careful in making any statement to me or anybody else that may tend to injure you ; but anything that you can say in your defence we shall be ready to hear, or to send to assist you." Mr. Justice Coleridge excluded this statement, which was made in consequence of this address. He said, "Upon reflection, I adhere to my decision in *The King v. Drew*. If the latter words had stood alone, a confession obtained by them would be clearly inadmissible ; they are likely to produce an improper effect on his mind. Before such evidence can be received, it must be seen that the prisoner's mind is free from any false hope or fear that would be likely to operate upon it and induce him to state that which is not true. If any such influence has been used, both the hope and the fear must be removed by a proper caution before the prisoner's statement can be received. In *Drew's case* the prisoner was told that what he said would be used for him. Is not that creating a hope that if he told his story, whether true or false, it might benefit him ? The caution that comes after does not take away the objection created by a promise in his favour ; because it is impossible to say that the caution so modified the influence of the promise as to leave his mind in an unprejudiced state to tell only the truth. Besides, the law will not sanction this sort of balancing the one influence with another. The prisoner's mind must be left entirely free. Approving of the decision quoted, I think this case comes altogether within the principle of it. The word "defence," necessarily conveying to the prisoner's mind that what he said would be for his benefit, the hope is created and remains. As to what has been said about the effect of this decision being to exclude everything said before the magistrates, I altogether differ from it. It is the duty of a magistrate to give the prisoner the opportunity of saying what he chooses, whether for or against himself, provided no improper influence be used. But when a man interferes who has no such duty, and uses language tending improperly to influence the prisoner's mind, the statement cannot be received." This decision is perfectly rational ; and warrants, as in that case so in this, that the caution given to the prisoner may be read as if the words "against you" had not occurred in it ; if constables and others will inform prisoners of the consequences of making a statement, it is only just to require that they should do so correctly, and not hold out to them unfounded hopes of advantage from making statements. Another decision on this point is *The*

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Queen v. Mary Furley (1 Cox C. C. 76.) There the prisoner was told by a policeman, whatever she told him would be used against her on her trial. Mr. Justice Maule decided this case on the authority of *The King v. Drew*, holding that to assure the prisoner that whatever she said would be used at her trial, was holding out to her an advantage which rendered her statement inadmissible. He said, where any caution at all is given, the proper course is, to let the prisoner know what he says may do him harm, but cannot possibly do him good. His words also are, "If you promise a person that what he states will at all events be used at the trial, you may be thereby inducing him to confess."

LORD CAMPBELL, C.J.—What possible inducement to confess do you hold out, when you tell a man that you will use his confession against him at his trial?

Mills.—The inducement of hope that the fact of his confessing and enabling you to use his confession, will be an advantage to him at the trial; the hope that the adduction at the trial of a confession made at the time of the charge will be regarded to his advantage, and be a ground of mercy, as arguing repentance and a disposition to repair the harm done. The man confesses, in order that the confession may be adduced at his trial. He makes the fact of his confession the ground of his claim to mercy, when it is adduced against him: (*Reg. v. Millen and another*, 3 Cox C. C. 507.) The law supposes that an innocent man charged with an offence, may be tempted, on being told it will be better to confess, or better to speak the truth, even to charge himself falsely with the crime (*Reg. v. Garner*, 1 Den. C. C. 329), and therefore that any statement he makes in consequence of being so addressed, shall be excluded. If so, why may not the prisoner have been similarly affected in the present case. No man really believes that, to tell a man he had better speak the truth, will be an inducement to him falsely to charge himself, except in the rarest instances. A prudent rule, according to views entertained at present on this subject, might let such confessions in evidence; but the law does not let them in, nor are we at liberty to see these questions except with the eyes of the law. Mr. Justice Maule's decision was not a hasty one. Another decision of his to the same effect is reported in *The Queen v. Harris* (1 Cox C. C. 106); the prisoner was cautioned in the same terms as in *Mary Furley's case*, and Mr. Justice Maule decided the same way. What is the difference between saying you had better confess, or you had better tell the truth, and holding out to the prisoner the promise of that circumstance from which the miserable advantage, such as it is, of confessing would be derived, viz., the merit of having made an immediate confession. But the question is not necessarily whether any inducement was held out to him to confess, but whether any assurance was held out to him of advantage in regard to the charge as the consequence

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of making a statement. A man's own statement made on the spur of the moment is often a clear proof of innocence, yet he is not by law entitled himself to adduce it in his own favour. If the prosecution say they will adduce his statement in evidence, they promise an advantage to him; and, if they promise this advantage to him, then, in point of law, his statement or confession made on the strength of it must not be regarded as free. The prisoner might have been tempted on his assurance to make a statement in confession and avoidance of facts against himself, and may thus have implicated himself in the charge. Lord Denman, in *Reg. v. Arnold* (8 C. & P. 662), has laid down the proper form of caution to be used by the magistrates to prisoners; this form seems cautiously framed to prevent the prisoner from supposing that he shall necessarily have the benefit of having what he then says adduced at his trial. The form prescribed by the statute 11 & 12 Vict. c. 42, s. 18, is in the words of Lord Denman, and thus inferentially sanctions the same conclusion. I submit that to assure a man that his own statement shall be added in evidence if he pleases to make one, is a promise of an advantage in regard to the charge, such as renders a statement made on the strength of it inadmissible in evidence. Secondly, that the words in this case held out that assurance to the prisoner, and therefore ought to have led to the rejection in evidence of the statement he made.

D. Power and *Newton* appeared for the prosecution, but the court intimated that as all the court were unanimous, it would not be necessary to hear them. Judgment.

LORD CAMPBELL, C.J.—As I reserved this point, I should prefer that the other judges deliver their opinion first.

POLLOCK, C.B.—I am of opinion that this conviction was right, and the evidence properly received. The ground upon which the rule of law proceeds is, that it would not be safe to receive a statement made under the influence of any hope or fear; not that the law presumes that any such statement would be false, but only that it would be unsafe to rely upon it. But does the rule apply to this case? It has often been held that a caution to speak the truth will not exclude the statement (*R. v. Court*, 7 Car. & P. 496); yet even in that case the person charged might have understood the caution as meaning that he could not tell the truth without confessing his guilt. The answer is, that he ought not so to have understood it, and it would indeed be strange to find a decision that an invitation to tell the truth, when there is no obligation to speak at all, can be considered as influencing the mind either by hope or fear. When, however, the admonition is coupled with an expression that it will be better for the prisoner to do so, then the statement has been excluded, as in *R. v. Garner* (1 Den. C. C. 359.) The real question is, whether the language used can be understood as conveying some intimidation, or offering some reward which might induce the person addressed to speak at all; the objection does not consist in the inducement to acknowledge guilt, but the

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inducement to speak at all; and perhaps the words "it will be better for you to speak the truth," may be objectionable on the ground that they import an inducement to say something. Now, excepting the cases decided by my brothers Coleridge and Maule, there is no authority for saying that the words used in the present case are at all sufficient to exclude the statement; and it certainly appears to me that the effect of them must have been to leave the prisoner in a state of perfect indifference whether he should open his mouth or not. With regard to the cases of *R. v. Drew* and *R. v. Morton*, before my brother Coleridge, and the cases of *R. v. Furley* and *R. v. Harris*, before my brother Maule, I must say that I cannot assent either to the decisions or to the reasons given in those cases. We are not to torture expressions, or consider what a man may possibly have misunderstood them to mean; for if so, even the words of the statute which has been referred to (11 & 12 Vict. c. 42, s. 18) might be ingeniously twisted to mean something different from that which was intended. I deem it important for the protection of innocence, that every man when he is charged with an offence should be distinctly told the nature of it; and that attention should be paid to anything which at that moment he may choose to say with regard to it, as he may be in a situation to make some statement which may ultimately lead to the proof of his innocence; but it is also important that he should be reminded that he is under no obligation to criminate himself, and that if he does state anything to criminate himself it will be given in evidence against him; and it is quite clear to me that no person, addressed as this prisoner was, could have misunderstood the meaning of the words, or have been in any way removed from that steady self-possession which is necessary to render his confession admissible against him.

PARKE, B.—I agree in the opinion which has been expressed by the Lord Chief Baron. I think that Lord Campbell was perfectly right in the course which he took at the trial. The objection was, that the words used by the police constable induced the confession; but my lord thought that although the words used by the constable were different from those prescribed by the statute, when the person charged is before a magistrate, the word *will* being substituted for *may*, yet such an expression could have no tendency to make him confess, or to induce him to say anything untrue, and that, in spite of it, if he did afterwards confess, that confession must be considered free and voluntary; and I consider that reasoning perfectly satisfactory. There is no doubt as to the general rule of law. Every confession, to be admissible in evidence, must be voluntary; and any inducement held out, either by promise of favour, or threat of harm, though of an indefinite nature, will exclude it. Whether it would not have been more wise to have allowed the evidence to go to the jury, subject to the observations which might have been made upon it, leaving them to judge of the whole matter, it is much too late to inquire now; for, from the earliest period it has been the practice, out of tender-

ness to the prisoner, to reject altogether confession made under such circumstances; but, on reviewing the decisions, I must say that I look with some shame to the state of the law upon this subject; and when I see the extremely trifling matters, which could not possibly have affected the mind of any man, but which have been allowed to prevail against the reception of confessions in evidence, I cannot but concur in the observation of a learned writer, Mr. Pitt Taylor, "that justice and common sense seem to have been sacrificed on the shrine of mercy:" (Taylor on Evid. p. 597.) Of course, each learned judge is compelled to decide these points as they arise; and no man likes to decide adversely to a prisoner, where there is any show of authority in his favour; and hence it is that these cases have gone to a length which cannot be supported. In the present case, it is impossible to see how the words can be construed to import any advantage to the prisoner from confessing. Instead of an inducement to confess, they seem rather to convey a caution against confessing; and if this were *res nova*, I cannot possibly conceive that it would bear argument. Then, are we bound by the decisions? Now, there is no case which goes the length necessary to exclude this confession, excepting those decided by my brothers Coleridge and Maule; and although I need not say that for those learned judges I feel the most unfeigned respect, I cannot concur in the judgments which they pronounced in those cases. This is not the first day that I have considered the question. It arose before me at Aylesbury some time ago; and I intended to have reserved the question there, if it had become necessary. On that occasion, and frequently since, I have reflected on the subject, and the conclusion at which I have arrived is, that it is impossible to say that any inducement is held out to a man to confess, when he is told that whatever he says will be taken down, and given in evidence against him. I think that we are indebted to Lord Campbell for reserving this case, in which, by the unanimous judgment of this court, the law must now be considered as settled.

ERLE, J.—I also think that the statement of the prisoner was properly received. According to my experience, when a person is wrongfully accused, the best means of discovering his innocence is found in the language which he himself used at the time of the charge; and so when a person is rightfully accused, it appears to me that a clear confession, well proved, is the most satisfactory evidence of guilt. By our law such evidence is not admissible where it has been obtained by any promise of advantage, or any threat held out to the person charged; but, unless there is a clear promise or a clear threat, I think that the evidence ought to be received; but the general principle must be applied by each judge to the facts of the particular case, according to the rules of common sense. I agree with Mr. Pitt Taylor that, in many of the cases, justice and common sense have been sacrificed,—but not as it appears to me at the shrine of mercy—rather at the shrine of guilt; because I regard a wrongful acquittal as unmerciful

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to the prisoner, whose real interests are sacrificed by his escape, as well as to society. The assurance that a statement either *will* or *may* be used in evidence for or against the prisoner, ought not, in my opinion, to exclude that statement; because it is the property of all evidence to operate *for* or *against* the party against whom it is produced; and, whether the words are, "it will be used," or "it may be used," they seem to me to come to precisely the same thing. In the able argument addressed to us, it was urged that the positive assurance that the statement will be used, holds out a promise of advantage, and therefore excludes the confession; but, if the words "will be used" import an absolute advantage, the words "may be used" equally import a contingent advantage, which ought also to exclude; yet the mention of the contingent user of the statement in evidence was never supposed to exclude; but, on the contrary, the Legislature has directed the officer of the law expressly to inform the prisoner that his statement may be used in evidence against him, for the very purpose of giving him a caution.

WILLIAMS, J.—I am of the same opinion. The words spoken by the constable seem to me to import nothing more than a caution to the prisoner that what he said would not be kept secret, but would be given in evidence upon his trial; and I think that those words do not prevent the confession from being free and voluntary.

Judgment.

LORD CAMPBELL, C. J.—I adhere to the opinion which I entertained at the trial; and I concur in the reasons which have already been given by my learned brothers. The rule has been well laid down by my brother Parke—that if any worldly advantage from a confession, or any harm from refusing to confess, is held out to a prisoner, a confession thereby obtained must be excluded; and the reason is, not that the law supposes what has been said to be false, but that the statement was made under some degree of violence, and not being free and voluntary, it is, upon the whole, safer and better to exclude it altogether. If the matter were *res integra*, I should doubt very much whether it would not be the better course to lay it before the jury, allowing them to give such weight to it under all the circumstances as they should think fit. The confession, however, in the present case appears to me clearly admissible. With regard to the stat. 11 & 12 Vict. c. 42, s. 18, the course there prescribed must be strictly followed, in order to let in evidence of the statement made by the prisoner before the magistrate; but the statute expressly says that nothing therein contained shall prevent the prosecutor from giving in evidence any other confession admissible by law. As to the decisions of my brothers Coleridge and Maule, which have been cited, I must say, with every possible respect for the opinions of those learned judges, that I cannot assent to those decisions. The cautions there given appear to me to have no tendency to compel

or induce the person addressed to say anything; but they are certainly very much in point here; and it was in consequence of those decisions that I reserved this case. I am glad to find that the course which I pursued has met with the approbation of my learned brethren.

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Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 24, 1852.

REG. v. JOHN SMITH. (a)

Larceny—Fraud—Procuring prosecutor's signature to a stamped receipt—Property—Possession.

A., pretending that he was about to pay B. a sum of money which was due to him, produced a receipt stamp, and placed it before B., who wrote thereon, at A.'s request, a receipt for the amount. A. then took up the paper and carried it away, but never paid the money.

Held, that B. never had such a property in, or possession of, the stamped paper, as to render the taking by A. a larceny.

CASE.

AT the Epiphany Quarter Sessions, held by adjournment at Swansea, in the county of Glamorgan, on the 9th January, 1852, the prisoner, John Smith, was indicted for having, on the 3rd of December, 1851, one piece of paper stamped with a certain stamp, denoting the payment of a duty to our Sovereign Lady the Queen of 6d., of the property, &c., of Thomas Henderson, feloniously stolen, &c.

The prosecutor, Thomas Henderson, had been time keeper and general clerk to Isaac Powell, a railway contractor, whose employment he left in November, 1851. The prosecutor applied frequently, and without success, to Powell, for payment of wages due to him, and on the 3rd of December, 1851, prosecutor went to a public-house, where he saw Powell and the prisoner, who was a ganger (or foreman) in the employ of Powell. Prosecutor asked Powell if he was going to settle with him; Powell answered yes; and that he would send the prisoner up to his house, to his (Powell's) wife, for the money. Powell then left the house, and prisoner followed him. In about two minutes prisoner returned, and beckoned the prosecutor to come to him into the public-house.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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Prosecutor went there; they were alone, and made up between them the balance of wages due to prosecutor, which they fixed at 4*l.* 11*s.* 1½*d.* Prisoner then took out of his pocket a 6*d.* stamp, and put it on the table; prosecutor took the stamp, and pulled it toward himself, and asked the prisoner whether he (prosecutor) should write a receipt for the full sum, 10*l.* 16*s.*, or for the balance. Prisoner said for the balance. Whilst prosecutor was writing, he observed prisoner pull out a fist full of silver, and turn it over in his hand. When prosecutor had written out the receipt, prisoner took it up, and went out of the room. Prosecutor followed him, and said, "Smith, you have not given me the money." Prisoner said, "It's all right." Prosecutor repeatedly asked prisoner for the money, but in vain. On the evening of the same day prosecutor met Powell and the prisoner together, and asked Powell if he had given prisoner any money for him. Powell said "No; but my wife has." Prosecutor said he had not had the money. "Well," answered Powell, "he (the prisoner) would not have the receipt if you (the prosecutor) had not had the money."

The CHAIRMAN told the jury, after much doubt, that, if they believed the evidence, the stamped receipt was the property, and was in the possession of the prosecutor at and after the time of his writing therecept; and that if they believed the prosecutor's statement, and should be of opinion that the prisoner took the receipt out of such possession with a fraudulent intent, they might convict him of larceny.

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The jury returned a verdict of Guilty, and the prisoner was sentenced to imprisonment for four calendar months, with hard labour.

The counsel for the prisoner raised the following objections:—1st. That there was not such a property and possession in the prosecutor as to support the charge laid in the indictment. 2nd. That there was no evidence of a felonious taking.

The CHAIRMAN reserved the case for the consideration of the judges, and begged their opinion thereon.

No counsel was instructed on behalf of the prisoner.

Terry, for the prosecution.—As to the second question stated in the case, it was clearly a question for the jury, whether the taking was felonious; and they have found that it was. As to the first, there is more difficulty; but no doubt a stamped receipt may be the subject of larceny, and is properly described as a piece of paper stamped with a certain stamp denoting the payment of a duty to the Queen, as in this case: (*Reg. v. Rodway*, 9 Car. & P. 884.) (b). In the present case it is submitted that, as soon as the prosecutor had filled up the receipt and made it a valid discharge upon the face of it, the property and the possession passed to him; and the prisoner had no longer any right to it until the money was paid.

(b) In that case a tenant got from his landlord a receipt for rent which the landlord had brought with him ready written, upon pretence that he wanted to look at it, and with intent to defraud the landlord of part of his rent, and he was held guilty of larceny.

The possession was transferred to him until that condition was complied with.

PARKE, B.—This is very like the case of *Rex v. Hart* (6 Car. & P. 106 (c)). There, as Mr. Justice Littledale observes, “the prisoner took the stamped papers from his pocket, and the prosecutor never had them except for the purpose of writing on them; they were never out of the prisoner’s sight.” So here, the receipt was never handed over to the prosecutor except for the purpose of his writing on it in the prisoner’s presence. The prisoner bought the stamped paper, and it was to continue his property. He retained the control of it throughout the transaction; and the prosecutor could not maintain trespass for the seizure of it.

Terry.—This was an outstanding receipt, which the prosecutor did not intend to part with until he received the money. He acquired, therefore, a special property in it, as bailee; and, although the stamped paper was bought by the prisoner, there is no doubt that a man may commit a larceny of his own goods, which he has bailed to another person; *R. v. Phipoe* (2 Leach, 673) appears adverse to the conviction in this case, but the circumstances were peculiar. There the prosecutor was compelled by great violence

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(c) In *R. v. Hart*, it appeared that in consequence of an advertisement offering to lend money upon bills of exchange or other personal security, the prosecutor who had occasion for a sum of money had an interview with the prisoner, who told him he could accommodate him with 5000*l.* at 6*l.* per cent. The prisoner produced from his pocket-book ten blank stamps, and the prosecutor wrote on each of them the words “payable at Messrs. Praed and Co., No. 9, Fleet-street, London.” Nothing was written on the stamps at the time but these words; the prisoner took the stamps away. The prosecutor saw him again several days afterwards, he said the prosecutor had omitted to sign his name, and he again produced the ten pieces of paper, the prosecutor signed them and wrote “accepted” on each of them and gave them to the prisoner again; he said he would send the money in a few days by the mail, but it was never sent. For the prisoner it was contended that the papers taken were not the subject of larceny, and that the 7 & 8 Geo. 4, c. 29, only makes perfect and available instruments the subject of larceny; and secondly, that there was no felony because the paper stamps being the property of the prisoner, no trespass was committed in taking them. In the course of his judgment Littledale, J. said: “There is, however, a fourth count which describes the papers as ten pieces of paper, each having a six shilling stamp, and upon this count the question is whether the prisoner can be said to have stolen this property? As to the first three counts, I think the case turns on a mere question of law which is, I think, entirely for the court, as these papers do not come within the description contained in the statute 7 & 8 Geo. 4, c. 29. The fourth count correctly describes them, but it seems to me that the circumstances under which they were obtained by the prisoner were not such as to make the prisoner liable for a felony. If a person by a false representation obtains the possession of the property of another, intending to convert it to his own use, this is felony; but the property must have previously been in the possession of the person from whom it is charged to have been stolen. Now, I think that these papers in the state in which they were, were the property of the prisoner. He took them from his pocket, and Mr. Astley never had them except for the purpose of writing on them; they were never out of the prisoner’s sight; Mr. Astley writes on them as was intended, and the prisoner immediately has them again. I think that the prisoner cannot be considered as having committed a trespass in the taking, as they were never out of his possession at all. The cases cited, *Evans v. Kymer* (1 B. & Ad. 528), was a case in trover, and to maintain trover it is not necessary that the party should have manual possession of the goods; if he has a right of possession that is sufficient. To support an indictment for larceny there must be such a possession as would enable the party to maintain trespass. It has been incidentally mentioned that these stamps might be charged in account to Mr. Astley, but that could only be if the transaction were completed. However, we must only take into consideration that which occurred on the last occasion when the words ‘accepted’ and ‘F. D. Astley’ were written. Indeed, it appears to me that on neither of the occasions when these parties met can the prosecutor be said to have had either the property or the possession of these papers so as to make the prisoner guilty of larceny in taking the papers out of the house.” Bolland, B. and Bosanquet, B. delivered opinions to the same effect.

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and menace of death to sign a promissory note on stamped paper previously procured by the prisoner, who was present during the whole time, and withdrew the note as soon as it was signed ; and the court held that it was no larceny of the note, as the delivery to the prosecutor could not, under the circumstances, be considered as vesting any property in him. (*d*)

POLLOCK, C. B.—The prisoner was guilty certainly of very fraudulent conduct; but the stamped paper was his own property at first and continued to be so throughout. It was handed to the prosecutor merely that he might write his name upon it and return it; he might, as the money was not paid, have struck out his name before he returned it; but he had no right to keep the stamped paper.

Judgment.

PARKE, B.—It is quite clear that there was no intention to give it to the prosecutor to keep, even for a moment, after he had written his name upon it. There is, of course, no doubt that if a man bails his goods to another, he may steal them out of the hands of the bailee.

ERLE, J.—This is *res judicata*, and the decision is in accordance with principle. It does not at all affect the rule that a bailor may steal his own goods from his bailee. To deliver goods to a carrier, and then steal them for the purpose of charging him with the value has been a common form of larceny.

TALFOURD, J., and CROMPTON, J., concurred.

Conviction reversed.

(*d*) See also *Reg. v. Edwards* (6 Car. & P. 521), where it was held to make no difference that the paper on which the order was written remained in the prosecutor's possession for half an hour, whilst he was fastened down to a chair.

COURT OF CRIMINAL APPEAL.

April 24, 1852.

REG. v. VINCENT AND WEST. (a)

Larceny—Allegation of property—Amendment.

A. was sent to the London Dock Company for two hogsheads of sugar, the property of B. By mistake, the Dock Company delivered two hogsheads belonging to C. On the road from the premises of the Dock Company to those of B., A. broke bulk, and abstracted a quantity of sugar.

He was indicted for larceny, and the indictment laid the property in B., but during the trial an amendment was made, and the property was laid in the Dock Company.

Held, that the amendment was authorised by the stat. 14 & 15 Vict. c. 100, s. 1; and that the property was properly laid in the Dock Company.

WILLIAM VINCENT and William West were indicted at the Middlesex Sessions for stealing, also for receiving, forty-five pounds weight of sugar, the property of Matthew Orchard. It appeared in evidence that Orchard was a carman, and was employed by Mr. Buck to convey two hogsheads of sugar, his property, from the London Docks to his warehouse, and that Orchard accordingly sent the prisoner Vincent with two delivery notes, and one of his horses and carts, for that purpose, but that the clerk of the London Docks delivered to him, by mistake, two hogsheads of sugar, belonging to a third person. It was then contended, that as the hogsheads so delivered to Vincent were not the hogsheads he was authorised to receive, no property in them passed to his employer Orchard, and upon the application of the counsel for the prosecution, the court amended the indictment, by describing the sugar as the property of the "London Dock Company."

The case then proceeded, and it was proved that after the hogsheads were delivered to the prisoner Vincent, he conveyed them a considerable distance from the premises of the London Dock Company, and was then met by the prisoner West, with a horse and cart, and that, assisted by West, he abstracted the forty-five pounds from one of the hogsheads, and delivered the same to West, who drove away with it. It was then contended by the prisoner's counsel, that the ownership of the property was still

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wrongly described, inasmuch as the property in the London Dock Company was founded on possession only, and therefore ceased as soon as they had parted with the possession, although under a mistake, and the goods had been removed from their premises.

The jury found both the prisoners guilty of larceny, and not guilty of receiving.

Two points were reserved,—1st. Whether the amendment was an amendment within the meaning of the statute 13 & 14 Vict. c. 100; and, 2nd. Whether the property was rightly laid in the London Dock Company.

Judgment was postponed, and both prisoners were committed to prison, to abide the decision of this case.

O'Brien, for the prisoner Vincent, and *Metcalf* for the prisoner West.—Assuming that the amendment was one authorised to be made by the stat. 14 & 15 Vict. c. 100, s. 1, the second question is whether the property was rightly laid in the London Dock Company; and it is submitted that it was not. The title of the company was possession, and the possession had been parted with before the larceny was committed. The London Dock Act (9 Geo. 4, c. xvi. s. 157) only empowers them to describe in indictments as the property of the company, goods which, at the time of their being stolen, were in the docks, basins, or premises of the company, in the custody of the company's officers or agents.

[*POLLOCK*, C.B.—This case does not depend upon that section at all. The Dock Company are not thereby prevented from taking proceedings against a person to whom goods have been delivered by mistake; if so, he might keep the goods, because the real owner might be content with suing the company. *PARKE*, B.—That clause does not abridge the rights of the company; and if their property is stolen, though, at the time, it may not be upon their premises, it is quite clear that they would properly be described in the indictment as the owners by their general corporate name.] As bailees of the sugars, they had certainly a special property so long as they kept possession; but, when they parted with the possession, their special property was gone. The owner might have maintained trover against them immediately without any demand: (*Devereux v. Barclay*, 2 B. & Ald. 702.) Now it is quite clear that no larceny was committed at the time of the delivery by the Dock Company to Vincent; because every larceny must include a trespass, and here the possession was voluntarily parted with, and no *animus furandi* is found to have existed at that time: (*R. v. Mucklow*, R. & M. 160, C. C. R.) There a letter was by the postman delivered by mistake to the prisoner who appropriated the contents; and he was held not guilty of larceny, on the ground that it did not appear that the prisoner had any *animus furandi* when he first received the letter. *Walsh's case* (Russ. & Ry. 215; 2 Leach 1054, 1082; and 4 Taunt. 258, 284) is still stronger; because there it was held that as no fraud was used to induce the prosecutor to deliver

a cheque, there was no larceny of the cheque, although the prisoner intended to misapply the proceeds before he received the cheque, and did misapply them accordingly. The recent case of *R. v. Thurborn* (1 Den. C. C. 387; S. C. *nom. R. v. Wood*, 3 Cox C. C. 453), which was a case of finding a lost note, illustrates the same rule. [POLLOCK, C. B.—The question here is not whether a larceny was committed, but whether the property was rightly laid in the London Dock Company.] But the cases cited show that, under such circumstances as the present, the special property is lost, that is, where the prosecutor intends to part with the possession. [POLLOCK, C. B.—The Dock Company did not intend to part with the possession. It was a delivery by mistake.] So it was in *R. v. Mucklow*. The Post-office had a special property in the letter, which they lost by delivering it to the prisoner by mistake. [PARKE, B.—There the letter was received by the prisoner as his own property.] This was the case of a carrier named by the consignee: and the property, therefore, would be in the consignee. [PARKE, B.—Not in this case; because he never consented to receive the two hogsheads which were sent. ERLE, J.—The Dock Company was the consignor of this sugar; and if a consignor sends to his consignee a pipe of wine instead of a hogshead of sugar, does he by that mistake lose his property in the pipe of wine. PARKE, B.—*Youl v. Harbottle* (Peake N. P. C. 49), shows that the consignor would be liable in trover to the real owner, who may hold him responsible for the mis-delivering.] In the case of *R. v. Harding* (Russ. & Ry. 125), the prosecutors had bought some barilla, lying at the London Docks, which was weighed out in the presence of their carter's clerk, and delivered to their carter's servant, to cart. On the road, the servant, jointly with other persons, stole the barilla; and the property was laid both in the prosecutors and in the carter; and the court appears to have held that either would do.

Parry, *contra*, was not called upon.

POLLOCK, C. B.—I believe that we are all of opinion that the Judgment conviction is right. Two points are reserved by this case; 1st whether the amendment made was an amendment within the meaning of the statute; about which I understand the learned counsel for the prisoners now to make no doubt; and 2ndly, whether the property was rightly laid in the London Dock Company? We must, for the purpose of deciding that question, assume that everything else necessary to constitute the offence was properly proved; that a larceny was committed against some one; the only question is, was it against the London Dock Company? Now the London Dock Company certainly had a special property as bailees of this sugar; and it is a mistake to suppose that whenever a person who has a special property, parts with the possession, he also parts with the special property. I think he certainly would not where, as in this case, he merely, by mistake, delivers over a wrong parcel. This is very like the case

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put by my brother Erle, of a delivery of wine instead of sugar. By such a delivery no change is effected in the property, which remains as before. Under the circumstances of the present case, it seems to me that the London Dock Company might also be considered as bailors of the sugar to the prisoner, who, during the journey, broke bulk. No doubt the property might have been laid in the real owner of the sugar, to whom the company were responsible; but I think that it was not necessary so to lay it. The Dock Company had a special property, and the bailment to the carrier was by them.

PARKE, B.—I am of the same opinion. No doubt the amendment was right, because the consignee never gave authority to the Dock Company to send these particular hogsheads; but it is an established rule of law, that either the bailor or bailee may maintain trespass (2 Roll. Abr. 551); and if so, the taking being felonious, the property may be laid in either; and I think that here the Dock Company must be considered as bailors.

ERLE, J.—I think it clear that the London Dock Company had a special property in these goods; if they had delivered up the goods of A., at A.'s order, the property would have passed; but, as by mistake they sent the goods of B. instead of the goods of A., it did not pass. Then the prisoner is a person entrusted by the company with the delivery of the goods; and in the course of the journey he breaks open the package. It seems, therefore, to me that the conviction was quite right.

TALFOURD, J. and CROMPTON, J. concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 29, 1852.

REG. v. MITCHELL AND OTHERS. (a)

Robbery—Assault with intent—Punishment.

Where, upon the trial of an indictment for robbery against three persons, they are convicted under Lord Campbell's Act (14 & 15 Vict. c. 100, s. 11) of an assault with intent to rob, and the jury find that the assault was committed by the three prisoners together, they are liable to transportation under ss. 3 and 10 of 1 Vict. c. 87; and the punishment is not limited to imprisonment under ss. 6 and 10 of that statute.

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THESE prisoners were tried before Alderson, B., at the last Liverpool Assizes, on an indictment stating that they, in and upon Thomas Tatem, together feloniously did make an assault and him in bodily fear and danger of his life then and there feloniously did put, and certain money of the said Thomas Tatem from his person and against his will then and there together feloniously and violently did steal. At the trial, in consequence of the absence of the prosecutor, the actual robbery could not be proved, as no money could be shown to have been taken from his person. But the three prisoners were convicted on the clearest evidence of the offence of feloniously assaulting the prosecutor with intent to rob him, and the jury expressly found, upon my asking them the question, that this felonious assault was committed by the three prisoners together. The case was one in which, in my judgment, it was right to sentence the prisoners to transportation; but as to the two men, a question arose whether it was competent for me, in point of law, to pass such a sentence. There was a previous conviction of felony proved against the woman which removed all difficulty in her case. By Lord Campbell's Act, 14 & 15 Vict. c. 100, s. 11, it is enacted, that upon all indictments for robbery, "if it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault, with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted; but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault, with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an

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indictment for feloniously assaulting with intent to rob." But there is this difficulty, that there are several clauses of the 7 Will. 4 & 1 Vict. c. 87, imposing different punishments in cases of assault with intent to rob. By sections 6 and 10 of that act, the extreme punishment for the simple offence of a felonious assault with intent to rob does not exceed three years' imprisonment, with hard labour. By sections 3 and 10 of that act, where the felonious assault with intent to rob is committed by any person together with one or more other person or persons, the punishment may extend as far as transportation for life, and the lowest punishment is that of imprisonment with hard labour for three years. I wish, therefore, to ask the judges the following questions:—1st. Is Lord Campbell's Act to be construed literally, and if so, whether the punishment must not be, under the 6th and 10th sections confined to three years' imprisonment with hard labour? Or, 2ndly, Is the true meaning of Lord Campbell's Act that in any indictment for robbery, if the robbery be simple, there is included also a simple felonious assault with intent to rob; and if the robbery be aggravated, a similar aggravated felonious assault, with intent to rob; and then whether, inasmuch as the jury have here found such an aggravated assault, the punishment may not be, under the 3rd and 10th sections, extended as far as transportation for life? That the inconvenience (if any) may be avoided in future, I thought it advisable to direct a return to the old form of indictment, which, as I was assured by the clerk of assize, formerly contained an express averment of an assault, with intent to rob. But this had been, in consequence of the recent alteration in the law, discontinued; and so the difficulty arose. I reserved the judgment till the next assizes, and request the assistance of the judges on the case.

The case was not argued by counsel.

LORD CAMPBELL, C.J.—I think that the second meaning suggested by the learned judge, is the true meaning; and that when the robbery charged is of an aggravated description, the assault with intent to rob may be punished with transportation as an aggravated assault. If the indictment was for simple robbery, it could not include such an assault as would justify that punishment.

ALDERSON, B.—I am of the same opinion. The language of the Legislature is, "upon any indictment for robbery," which includes cases of aggravated, as well as those of simple robbery. The better construction appears to me to be that in all indictments the assault should follow the robbery. That being so, transportation for life may be awarded. It is fortunate that such is the case, as this was a garrotte robbery.

MAULE, J., and CRESSWELL, J., concurred.

EERLE, J.—I am of the same opinion. This judgment is important, as its effect will be to prevent additional counts.

Judgment affirmed.

COURT OF CRIMINAL APPEAL.

January 24, 1852.(Before JEEVIS, C. J., ALDERSON, B., COLERIDGE, J.,
WIGHTMAN, J., and CRESSWELL, J.)

REG. v. BOULTER. (a)

Perjury—Corroborative evidence.

An indictment for perjury alleged that the defendant falsely swore that only one quarter's rent was due from him to his landlord in June, 1851. The landlord (the prosecutor) swore that five quarters' rent was due at that time, and, to corroborate his testimony, his son swore that in August, 1850, the defendant admitted to him that three or four quarter's rent was then due.

Held, that the evidence of the son being consistent with the defendant's statement, as well as with that of the prosecutor, was not sufficient corroboration of the latter to justify a conviction.

THE following case was submitted for the opinion of the Court by the Recorder of London:—

At the session of Oyer and Terminer and Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, in December last (1851), Thomas Boulter was tried before me for perjury. The indictment alleged that the defendant had been tenant to one George Healey (the prosecutor) of a certain dwelling-house and premises, under a certain rent, and that in the month of June, A.D. 1851, the said George Healey had distrained upon the defendant for certain arrears of that rent. The indictment assigned for perjury, that the defendant Boulter had, in substance, falsely sworn, amongst other things, upon a trial at Nisi Prius, upon which the question was material, that there was only one quarter's rent of the rent aforesaid due at the time of the said distress.

Upon the trial before me, Mr. Healey, the prosecutor, swore positively to the fact of there being five quarters of the rent due to him at the time of the said distress, viz., in June, 1851, and produced his books, by which he refreshed his memory, and proved the last payment of rent to have been for the rent at Christmas, 1849. For the purpose of corroborating his statement, and showing, by the oaths of two witnesses, the falsity of the matter sworn to, John Healey, the son of the prosecutor, was examined, who deposed to a conversation with the defendant in

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the month of August, A.D. 1850, and that in that conversation the defendant Boulter admitted that three or four quarters of the said rent were then due. A receipt from the prosecutor to the defendant was produced upon the trial, purporting to be a receipt for the said rent to Christmas, 1850. This receipt the prosecutor swore had been given in error, and ought to have been a receipt for the rent to Christmas, 1849, only. No evidence of payment of rent was given by or on behalf of the defendant subsequently to August 1850. It was contended, on behalf of the defendant, that the fact of more than one quarter's rent being due at the time of the distress was not sufficiently made to appear by the oath of two witnesses, for the case to be left to the jury; that the statement by John Healey, as to the admission of the defendant, went no further than to establish the fact that in August, A.D. 1850, rent was due, but did not confirm the prosecutor in his statement of the five quarters' rent being unpaid at the time of the distress, or in explanation of the error in the receipt. I, however, overruled the objection, and left the matter to the decision of the jury, who convicted the defendant. Whereupon, I postponed judgment upon the said indictment, and committed the defendant to the gaol of Newgate, in order that your lordships' opinion might be taken upon the aforesaid facts, in the form of a case to be stated; and the foregoing is the case upon which your lordships' opinion is requested.

O'Brien (for the defendant) contended that the statement of the son was no corroboration of the father's evidence, for it was quite consistent with one quarter's rent only being due in June, 1851, —that three or four quarters' was due in August, 1850. With regard to the necessity of corroborative proof, in cases of perjury, the authorities from *R. v. Muscott* (10 Mod. 193), to *R. v. Parker* (Car. & M. 639), were uniform in requiring it. In the latter case it was distinctly held by C. J. Tindal that two witnesses must speak to the fact, or to a part of the fact, on which the perjury was assigned. But, to call one witness to speak to one fact, and another to speak to a second fact, entirely unconnected with the first, was a clear transgression of the rule. It might be that corroboration of any part of a witness's testimony would have the effect of rendering the truth of the whole of his evidence more probable, but the principle went much further than this, and required a confirmation of the particular fact upon which the perjury was assigned. In *R. v. Roberts* (2 Car. & K. 617), the defendant had sworn that a certain person was never out of his sight between eight and nine o'clock in the morning of a particular day. One witness deposed to having seen the defendant in a certain place between those hours; and another witness swore that he saw the person of whom the defendant had spoken at a place six miles off, between the same times, and the evidence was held sufficient; but in that case each of the two witnesses negatived the statement of the defendant, that he was in the company of the said person for the space of time mentioned.

CRESSWELL, J.—Suppose that there was no absolute contradiction ; for instance, that the two persons had been seen at such a distance from each other as to render it exceedingly improbable, although not quite impossible, that they could have been together at the time sworn to,—would not that have been evidence for a jury ?

COLERIDGE, J.—Suppose that a man swore he was not at Plymouth on such a day, and one witness swore that he saw him there, and another that he saw him in a train between the last station on the line and Plymouth, going in the direction of the latter, it would be quite possible that he had never reached Plymouth, but would not that be sufficient corroborative testimony to be submitted to a jury ?

O'Brien.—That would go to the precise issue, and would, therefore, be material in corroboration. But the confirmation must be of the evidence of the precise facts in dispute. The rule acted upon in the Ecclesiastical Courts in cases of adultery is analogous, and the question has been much discussed. In *Kenrich v. Kenrich* (4 Hagg. Cons. Rep. 114), and in *Simmons v. Simmons* (1 Rob. Rep. 566), it was held that evidence which merely tends to show that it was more probable the transaction deposed to had happened than that it had not, was not corroborative evidence of the fact.

COLERIDGE, J.—What is the meaning of the precise fact itself ? Take the case of an alleged act of adultery on the 1st of July, and proofs that suspicious liberties had been taken in the month of May preceding.

O'Brien.—There it might be difficult to suggest any change in the *status* of the parties in the meantime.

CRESSWELL, J.—Or would a previous letter from the defendant, soliciting the woman to comply with his desires, be admissible ?

O'Brien.—Probably it would.

COLERIDGE, J.—Yet that would only tend to show that the witnesses who speak to the adultery on a particular day were probably speaking the truth. Is it necessary that all the evidence should bear directly upon the one single act sought to be established ?

O'Brien.—At the very least the corroborative evidence must tend to show that the transaction in question had probably occurred, and not merely that the principal witness was the witness of truth. The instances put all tend to establish that adultery was committed. But here the question is with regard to the state of the accounts between the parties on a given day, and proof is adduced of the state of accounts nearly twelve months before. What presumption can there be that the pecuniary relations between the parties continued the same during that period. If it had been proved, by corroborative evidence, that no payments had been made in the meantime, the case would be altered ; but the receipt for rent produced has no such effect. It bears date in

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1850, and it is but the mere unsupported statement of the prosecutor that the money was paid in 1849, and that the date 1850 is a mistake.

[He was here stopped by the court.]

Clarkson (*Hance* with him) for the Crown.—It is a mistake to suppose that two witnesses are essential to establish a case of perjury. No doubt there must be something more than the evidence of one witness, but if there is any additional proof whatever, the court cannot decide upon its value, but it becomes a question for the jury. The corroboration, doubtless must be of some material particular, as was said by Coleridge, J. in *R. v. Yates*: (C. & Mar. 132.) With regard to the Ecclesiastical Courts, the rules of evidence are totally different from those of the Common Law Courts: (Taylor on Evidence, 654.) They have no application to a case like this. In the first place, the prosecutor here swears to the fact; secondly, he produced a book kept by himself, in which were entries of the transactions made at the time of their occurrence.

CRESSWELL, J.—That surely cannot be considered as independent testimony; it is only used for the purpose of refreshing his memory.

COLERIDGE, J.—It is corroborating him by himself.

Clarkson.—It is, at all events, an independent fact, that in August, 1850, he confessed that three or four quarters' rent was due. After that, it is for him to show that the rent had been paid.

CRESSWELL, J.—The production of the lease would have been equally important according to your view of the matter, because it would have shown that in June, 1851, several quarters' rent must have been due, unless it had been paid.

WIGHTMAN, J.—Suppose you reverse the case here, and assume that the defendant had indicted the prosecutor for perjury, for swearing that five quarters' rent was due in June, 1851. There would then have been sufficient corroborative evidence to go to the jury. There would be the oath of the defendant, and the receipt on its face would confirm him that less than that amount was due, and the now prosecutor could not be heard to explain it.

Clarkson.—Whenever a party to a suit is called on to prove a negative, less evidence is considered sufficient than where the proof is necessarily of a positive character; and, unless such evidence as this is to be submitted to the jury as confirmatory of a positive statement by the principal witness, it may become utterly impossible to convict, in numerous cases, of perjury. We make out such a *prima facie* case as, at least, calls for an answer, and the defendant might easily prove payment of the rent, if it was ever paid.

COLERIDGE, J.—But surely the sufficiency of a case for a prosecution cannot depend upon the course pursued by the defendant. At the end of the prosecutor's evidence, the prisoner's counsel has a right to say that a sufficient case has not been made out for the consideration of a jury.

JERVIS, C.J.—I do not think it necessary in this case to lay down any general rule with regard to corroborative evidence in cases of perjury. It is enough for us to say that there must be something in the case to make the oath of the prosecutor preferable, on the whole, to the oath of the prisoner. But we think that rule is not satisfied by the evidence in this case. For the evidence of the son, John Healey, is quite as consistent with the truth of the statement on oath of the prisoner as with that of his father, the prosecutor. It is not, perhaps, strictly correct to say that the judge should tell the jury that there is no case at the end of the evidence for the prosecution. The whole case must be complete before the judge sums up to the jury. But, if the evidence for the prosecution be insufficient in law, it is not to go to the jury because the prisoner does not choose to clear up any difficulties that may exist.

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The rest of the judges concurred. *Conviction quashed.*

Olarkson and Hance for the prosecution; *O'Brien* for the prisoner.

COURT OF CRIMINAL APPEAL.

January 24, 1852.

(Before JERVIS, C.J., ALDERSON, B., COLEMAN, J.,
WIGHTMAN, J., and CRESSWELL, J.)

REG. v. NEWMAN. (a)

Perjury—Proof of former trial—Record.

A defendant was indicted at the Central Criminal Court for perjury, committed on the trial of W. D., at a previous session of the same court. To prove the trial of W. D., an officer from the Central Criminal Court produced from the office of the clerk of the court the indictment upon which W. D. was tried, and which had upon the face of it words denoting that W. D. had surrendered, pleaded, been found guilty, and sentenced. He also produced the minute book of the court, in which, together with an abstract of the indictment, such particulars were shortly entered.

Held, that such evidence was sufficient proof of the trial, and that it was not necessary to produce any record or certificate of the trial of W. D.

THE following case was submitted to the judges of the Court of Criminal Appeal by the Recorder of the City of London :—

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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“ ‘To the justices of either Bench and Barons of the Exchequer, sitting for the consideration of the Crown Cases reserved under the 11 & 12 Vict. c. 78.

“ ‘At a Session of Oyer and Terminer and Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, in the month of December, 1851, Ann Harriett Newman was tried before me, for perjury.

“ ‘The indictment charged the perjury to have been committed upon the trial of one William Day for a misdemeanor particularly mentioned (not stating whether followed by a conviction or acquittal) at a General Session of the Delivery of the Queen’s Gaol of Newgate, holden for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the suburbs of the City of London, on Monday, the 12th day of May, A.D. 1851, before the Right Honourable John Musgrove, Lord Mayor of the City of London, Sir Edward Hall Alderson, Knight, one of the Barons of Her Majesty’s Court of Exchequer, Sir Thomas Noon Talfourd, Knight, one of the Justices of Her Majesty’s Court of Common Pleas, Thomas Quested Finnis, Esquire, one of the Aldermen of the said city, William Lawrence, Esquire, one of the Aldermen of the said city, Russell Gurney, Esquire, Judge of the Sheriffs’ Court of the said city, and others their fellows, justices, assigned to deliver the said Gaol of Newgate of the prisoners therein being.’

“ ‘No record regularly made up, nor any copy thereof, nor any certificate in pursuance of the 13th section of the 14 & 15 Vict. c. 99, or of the 22nd section of the 14 & 15 Vict. c. 100, was produced in evidence in support of the said allegation. In the absence of such evidence, it was proposed to prove the said averment, and that the trial mentioned in the indictment had taken place, by means of the original minutes from which the record would have been perfected, if made up in due course.

“ ‘The practice of the office of the clerk of the Central Criminal Court, with reference to these minutes, was proved to be as follows:—When a prisoner is called upon to plead, his plea of not guilty is entered by the officer present in court upon the indictment, and signified by the letter ‘P.’ Afterwards, and when the prisoner is tried, his offence is shortly entered by the officer present in court in a minute book kept for the purpose, and the plea of the defendant in such book is denoted by the word ‘puts.’ If the verdict be guilty, such verdict immediately follows the word ‘puts,’ and is simply entered by the officer present in court ‘guilty,’ and the sentence is then in like manner briefly entered immediately after such verdict. These minutes are afterwards transcribed without abbreviation upon the indictment, and the original ‘P.’ erased. At the trial of every session, the indictments found at such session are placed upon a file, together with two captions, one called the oyer and terminer caption, and the other the caption of gaol delivery. Every indictment placed upon such file would, according to the practice of the office, have

been found at the Session of Oyer and Terminer expressed in such caption. The caption of gaol delivery indicates that such a session of gaol delivery was held, and all the proceedings subsequent to the finding of the bill entered upon the indictment (in the absence of an entry to the contrary) are referrible to the session of gaol delivery expressed in the caption of gaol delivery.

"An officer of the Central Criminal Court produced from the office of the clerk of the court a file of indictments having a caption of oyer and terminer attached thereto, also a caption of gaol delivery. The latter was in the following words:—

"Central Criminal Court, to wit, at the General Session of the Delivery of the Queen's Gaol of Newgate, holden for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the suburbs of the city of London, on Monday, the 12th day of May, in the 14th year of the reign of our sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, before John Musgrove, Esquire, Mayor of the City of London; Sir Edward Hall Alderson, Knight, one of the Barons of our said Lady the Queen of the Court of Exchequer; Sir Thomas Noon Talfourd, Knight, one of the Justices of our said Lady the Queen of the Court of Common Pleas; Thomas Kelly, Esquire; Sir Chapman Marshall, Knight; John Kinnersley Hooper, Esquire, Aldermen of the said city; the Right Honourable James Stuart Wortley, Recorder of the said city; William Hunter, Esquire, Thomas Sidney, Esquire, William Lawrence, Esquire, other of the aldermen of the said city; Edward Bullock, Esquire, Common Sergeant of the said city; Russell Gurney, Esquire, Judge of the Sheriffs' Court of the said city, and others, their fellows, justices of our said Lady the Queen, assigned to deliver the said Gaol of Newgate of the prisoners therein being."

"Amongst the indictments so produced was that against the said William Day. There was written upon the face of it the following words:—

"Surrender, and puts himself. Jury say, guilty on the 3rd, 4th, and 6th counts only. To be imprisoned in the House of Correction at Clerkenwell, one year."

"There was also produced from the custody of the clerk of the court a certain minute-book, in which was the following entry:—

"Surrs. and puts. Guilty on 3rd, 4th, and 6th cots. 13 calr. mos. witht. h. l."

"No. 34. William Day. By false pretences and false representation did procure one Harriett Newman, woman, under the age of twenty-one years, to have illicit carnal connection with the said prisoner.

"Second count.—Did attempt and endeavour to procure.

"Third count.—Like 2nd count; to have connexion with a man unknown.

"Fourth count.—Conspiring to procure her to have connexion with a man unknown.

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Perjury—
Proof of former
Trial—
Record

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“ ‘Fifth Count.—Asst. to ravish.

“ ‘Sixth count.—Common asst.’

“ An officer of the Central Criminal Court deposed, that he remembered the trial of Day, and was present on that conviction; that he took his plea of not guilty, and wrote the letter ‘P.’ upon the indictment; that that ‘P.’ according to the course of business in the office, had been erased, and the entry then appearing upon the indictment had been made by him in its stead; that part of the entry in the book, *i.e.*, ‘surrs. and puts,’ was in the handwriting of the witness, and from that, as well as from his personal recollection on the subject, he knew that the person to whom that entry related had been tried; that the entry upon the indictment was made by the witness from the said minutes entered in the book, and that that entry, together with the caption and the entry in the book, would be the materials from which the record of such trial would be made up.

“ It was objected on the trial that the evidence before set forth was insufficient to maintain the allegations contained in the indictment; that an authentic record, or one of the certificates before mentioned ought to have been produced; that, in fact, the evidence given was no more than parol evidence of what ought to have been proved by record, or some other recognised and authentic document, and that the prisoner was entitled to an acquittal for want of proper evidence. I, however, ruled the contrary, and as the other necessary facts were proved to the satisfaction of the jury, they found the prisoner guilty. But, considering it doubtful whether I was right in my ruling, I postponed judgment on the said indictment, and committed the prisoner to the Gaol of Newgate, in order that your Lordships’ opinions might be taken upon the subject, upon a case stated, and the foregoing is the case upon which your Lordships’ opinion and decision is requested.”

No counsel being instructed, on the part of the prisoner,—

Payne (for the Crown) submitted that the conviction was right. Possibly, if the trial had taken place in another court, it might have been necessary to have had the record made up, but being in the same court, the judge had properly received the minutes of its own proceedings. All that was requisite was proof of the trial. Anything that took place subsequently was immaterial. The production of the indictment, and verbal evidence that the defendant therein mentioned was tried under it, was amply sufficient.

It was contended, for the prisoner, that the late statutes (14 & 15 Vict. c. 99, s. 13, and 14 & 15 Vict. c. 100, s. 22, which made a certificate admissible, in proof of a trial and conviction, had altered the law, and had rendered proof by record or certificate necessary.

JERVIS, C. J.—These statutes were intended to increase the facilities of proof, and not to diminish them.

Payne.—At the Old Bailey, it has always been the practice to

prove a former trial by the minutes and entries produced by the officer: (*Horne Tooke's case*, 22 Howell's State Trials, 447.)

JEEVIS, C.J.—The court entertains no doubt whatever that the evidence given was sufficient. There is no allegation of any matter of record; but the only fact to be proved was the trial. Probably that might have been proved by any person present at it.

ALDERSON, B.—All the minutes from which the certificate would have been made up, were put in evidence, and these were produced by the officer who would have had to make up the certificate. Surely that is amply sufficient.

The rest of the Court concurred.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

May 29, 1852.

(Before LORD CAMPBELL, C. J., ALDERSON, B., MAULE, J.,
CRESSWELL, J., ERLE, J.)

REG. v. OLDHAM. (a)

*Implements of housebreaking—Possession of at night—Stat. 14 & 15
Vict. c. 19, s. 1.*

Whether an implement is to be considered an implement of housebreaking, within stat. 14 & 15 Vict. c. 19, s. 1, must depend upon the purpose for which the person charged has possession of it.

Any implement that may be used for the purpose of housebreaking, if the jury find it to have been in the possession of the person charged for that purpose, at the time and place alleged, is an implement of housebreaking within that section, although it may also be an implement which is used in the ordinary affairs of life for lawful purposes.

Where, therefore, upon the trial of an indictment under that section, the evidence was that the prisoner was found by night, and without lawful excuse, in possession of a number of house-door keys, and a pair of pincers, all of an ordinary description, but not in possession of any of the particular implements of housebreaking enumerated in the section, and the jury found that the prisoner at the time had the keys in his possession for the purpose of housebreaking:

Held, that he was properly convicted of the offence thereby created.

AT the Court of General Quarter Sessions holden for the county of Lancaster, at Kirkdale, on the 20th of April, 1852, Joseph Oldham was tried before John William Harden, Esq., and others,

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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justices of the peace, upon an indictment charging him with being found by night having in his possession, without lawful excuse, certain implements of housebreaking, to wit, one pair of pincers, ten keys, and a piece of iron, against the form of the statute; and it appeared in evidence that the prisoner was found by night, and without lawful excuse, in possession of a number of house-door keys, and a pair of pincers, all which articles were of an ordinary description, such as are commonly used for lawful purposes, but which were capable, from their nature, of being also used for purposes of housebreaking. It was objected, on the trial, that the evidence did not support the indictment, as the articles were not either picklock keys, implements of housebreaking, or any of the other articles mentioned in the first section of the stat. 14 & 15 Vict. c. 19, which enacts, that "if any person shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling or other building whatsoever, and to commit any felony therein; or if any person shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person), any *picklock key*, crow, jack, bit, or other implement of housebreaking; or if any person shall be found by night having his face blackened, or otherwise disguised, with intent to commit any felony; or if any person shall be found by night in any dwelling-house, or other building whatsoever, with intent to commit any felony therein, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned, with or without hard labour, for any term not exceeding three years." The chairman left it to the jury to say whether the articles so found in the prisoner's possession were implements which might be used for purposes of housebreaking, and whether at the time he was so found in possession of them, it was his intention to use them as implements of housebreaking.

The jury found the prisoner guilty, but inasmuch as the question raised on the trial is not free from doubt, and the court was strongly urged by the learned counsel for the prisoner to submit it for the consideration of the judges of the Superior Courts, judgment was postponed, in order that such opinion might be taken, and the prisoner was remanded to the custody of the governor of the house of correction at Kirkdale, until the Midsummer Sessions.

The foregoing is the case upon which the opinion of the said judges is required accordingly.

The case was not argued by counsel.

LORD CAMPBELL, C.J.—I am of opinion that this conviction ought to be affirmed. The prisoner is charged with having unlawful possession of instruments of housebreaking. Now, it is true that he had not any crowbar or picklock in his possession, and that the keys which he had were of an ordinary kind,—but the jury have found that there was the purpose, and intent on the

part of the prisoner to use those keys as implements of house-breaking; and though they may be used for lawful purposes, it is clear they may also be used for the purpose of housebreaking, which, as it appears to me, is all that the statute requires.

ALDERSON, B.—I am of the same opinion. Many cases may be put in which it would be perfectly clear that persons were in possession of perfectly lawful instruments, for housebreaking purposes. If, for instance, the door-keys to all the houses in a long street were found in the possession of a person, without lawful excuse, there could be very little doubt that he meant to use them as implements of housebreaking. Or, suppose a chisel, which exactly fitted a mark upon a particular door, which there had been an attempt to break open, was found upon a man, there could not be much doubt that it was an implement of house-breaking, although capable of being used for lawful purposes, not specified in the act of Parliament.

MAULE, J.—In Mr. Greaves's edition of these Criminal Statutes, Judgment. the words of the statute are set out: "or if any person shall be found by night having in his possession, without lawful excuse (the proof of which excuse shall lie on such person), any picklock key, crow, jack, bit, or other implement of housbreaking;"—there is a comma after the word "key," and not one before it; but on the Parliament Roll it is well known there are no stops, and I think the section should be read as if there was a comma before the word "key," as well as after it: "any picklock, key, crow," &c. If this is not so, then the act of Parliament does not comprehend the most usual implement of housebreaking,—"skeleton keys." The word "picklock" is perfectly intelligible; and the word "key" would comprehend a skeleton key, and any kind of key capable of being employed for purposes of housebreaking. Upon this view of the statute, the possession of keys, without lawful excuse, falls within the express words of the act of Parliament.

CRESSWELL, J.—I am of the same opinion as my brother Maule.

ERLE, J.—I also think that any implement capable of being used for the purposes of housebreaking, where the jury find that the person charged had them in his possession for the purposes of housebreaking, are within the statute.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

May 29, 1852.

REG. v. PERKINS. (a)

Larceny—Principal in the second degree—Receiver.

A person cannot, at the same time, be both a principal in the second degree in the commission of a larceny and also a felonious receiver of the stolen goods.

GEORGE PERKINS was indicted at the Middlesex Sessions, February, 1852, for stealing a piece of pork, the property of his master, and Henry Perkins for receiving the same, knowing it to have been stolen. It appeared, in evidence, that on the day of the felony the two prisoners were seen conversing together near the prosecutor's premises; that they went together to the warehouse of the prosecutor (the master of George), where the pork was kept; that the prisoner George went into the warehouse and took the pork out of a tub, and brought it out of the warehouse and gave it to the prisoner Henry, who had remained on the outside, and who was not in a position to see what the other prisoner did in the warehouse, but was sufficiently near to have rendered him aid in case he had been taken into custody: that is to say, the evidence was sufficient to have convicted him as principal in the second degree. It was contended, for the prisoner Henry, that this evidence did not support the charge of receiving, and that, as there was no count charging him with stealing, he must be acquitted. The jury found the prisoner guilty; and the question reserved for the Court of Appeal was, whether a person who was a principal in the second degree, could, under the above circumstances, be treated as a receiver of the goods stolen and convicted of that offence. Judgment was passed upon the prisoner, but the execution thereof was respited, and he was committed to prison to await the decision of this case. (b)

C. Pollock appeared for the Crown.

LORD CAMPBELL, C. J.—Assuming, as I think we are bound to do, from the case submitted to us, that the prisoner was a principal in the second degree, he could not take the stolen property from himself.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

(b) This case stood for argument on Saturday, April 24; but the court directed that it should be sent back for the purpose of being re-stated; and it was accordingly afterwards stated as above.

ALDERSON, B.—If one burglar stands outside a window while another plunders the house and hands the goods to him, he surely could not be indicted as a receiver.

MAULE J.—My brother Adams seems to have intended to ask us, whether, in a case where a prisoner was, in a popular sense, guilty of receiving, he might be treated as a receiver, notwithstanding the fact that he was a principal in the theft; and it is clear that he cannot.

CRESSWELL, J., and ERLE, J., concurred.

Conviction quashed.

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COURT OF CRIMINAL APPEAL.

June 14, 1852.

REG. v. HANNAH MOORE. (a)

Confession—Inducement—Person in authority—Mistress.

Upon a trial for child murder the prisoner's confession to a surgeon, who was attending her, was offered in evidence. Before the surgeon came in, her mistress had told her that she had better speak the truth; and she had said, in answer, that she would tell it to the surgeon; but the husband of the mistress was not the prosecutor.

Held, that as the offence was not an offence against the mistress, she was not a person in such authority that the inducement which she had held out would exclude the confession, which was consequently admissible.

THE following case was reserved by Parke, B. :—The prisoner was tried at the last assizes for Sussex before me, on the coroner's inquisition, for wilful murder of her new-born child. There was an indictment, also, against her for the same offence. She was found guilty of the misdemeanor of concealing the birth of her child. There was offered, in evidence against her, a confession made by her, in the presence of her mistress, to a surgeon who was attending her, of her having strangled her child with a thread, and placed the dead body in a privy; where it was found with the thread round its neck. Her mistress had told her before the surgeon came in, that she had better speak the truth; and, in answer, she said she would tell it to the surgeon. An objection was taken that any subsequent confession was inadmissible. After consulting my brother Coleridge, I received the evidence, being of opinion that in this case, her husband not being the prosecutor, nor the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law

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offence in any way connected with the management of the house, the prisoner's mistress could not be considered as having any control over the prosecution, so as to raise a presumption that the inducement held out by her would be likely to cause her to tell an untruth. The prisoner was acquitted of the murder because the jury believed that she was in such a state of mind that she did not know what she was about at the time. I request the opinion of the judges whether the evidence was admissible.

The case was argued on Saturday, April 24th, before Pollock, C.B., Parke, B., Erle, J., Williams, J., and Crompton, J.

Creasy, for the prisoner.—The evidence was inadmissible. If the surgeon had told the prisoner that she had better speak the truth, then the case would have been precisely the same as *R. v. Garner* (1 Den. C. C. 329; 3 Cox C. C. 175), where the prisoner's confession was held inadmissible. The distinction taken was, that in this case, the husband not being the prosecutor, the mistress was not a person in authority, whose advice was likely to influence the mind of the prisoner. [PARKE, B.—The offence had nothing to do with the domestic government of the house.] In *R. v. Upchurch* (R. & M. C. C. R. 465), the offence charged against the prisoner was that of attempting to set fire to the house of her master, who was the prosecutor; and a confession made to the mistress in the absence of her husband, was held inadmissible in consequence of the hopes which the mistress had held out in order to induce the prisoner to confess. That the surgeon was a person in authority seems decided by *Kingston's Case* (4 Car. & P. 387), where upon an indictment for administering arsenic, it appeared that the surgeon who was called in, said to the prisoner, "You are under suspicion of this and had better tell all you know;" and a statement subsequently made by the prisoner was consequently held inadmissible. The early law upon this subject is collected in the argument in *Gilham's Case* (R. & M. C. C. R. 186), where the confession was supposed to have been made in consequence of the religious exhortations of a clergyman, and was held admissible, because no hopes of temporal advantage from confessing had been held out. The general rule is clear,—that the confession is not admissible unless it is free and voluntary; and the limitation of the rule, which requires that the inducement should be held out by some person in authority, was intended to apply only to the interference of idle, officious persons having no connection with the charge. This appears from *Row's Case* (Russ. & Ry. 153.) There it appeared that, while the constable who apprehended the prisoner had him in custody to take him before a magistrate, some of the neighbours, who had nothing to do with the apprehension, prosecution, or examination of the prisoner, officiously interfered, and admonished the prisoner to tell the truth and consider his family, which was a large one. No observation was made by the constable, nor did the prisoner answer those who addressed him, but he desired the constable to call upon him at the prison in an hour; and when the constable did so he made a confession to him, which was

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held admissible in evidence. *Taylor's case* (8 Car. & P. 733) is an important authority to show that the confession in this case was inadmissible. There the prisoner was charged with setting fire to the house of her master, who was the prosecutor; and on the morning of the fire she was sent for to come into the parlour, where her mistress and W. were. W. was not a constable, nor in any office or authority; but he said to her, "You had better tell how you did it," and Patteson, J., refused to receive her answer, saying, "It is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and in this case I should have received the evidence of the statement made to W. if the inducement had been held out by him alone. But here the inducement does not rest with him alone, because Mrs. L., who was the wife of the prosecutor and also the mistress of the prisoner, was present with W., and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think, therefore, that the inducement must be taken as if it had been held out by Mrs. L., who was a person in authority over the prisoner, and that, therefore, the evidence is inadmissible." Again, in *R. v. Hewett* (Car. & M. 534), the same learned judge refused to receive in evidence a statement made by the prisoner two days after her mistress, whose money she was charged with stealing, had promised to forgive her, if she told the truth. In *Simpson's case* (R. & M. C. C. R. 410), which was also an indictment for setting fire to a house, the prisoner, who was a girl about fifteen years old, was subjected to many applications by the neighbours and relations of the prosecutor, both in the nature of threats and promises, urging her to confess; and her statement was held inadmissible. The precise ground of decision is not stated in the report; but it has been supposed to rest upon this, that on some of the occasions the mistress of the prisoner was present: (Joy on Confessions, p. 9; 2 Russ. on Crimes, Greaves's Ed., p. 842.) It is true that the master was also the prosecutor in that case; but the admissibility of the evidence cannot depend upon the accident, who is bound over to prosecute. The Queen is the prosecutor in every case, and often, for convenience sake, a constable is bound over to prosecute; but the question is, who is the party likely to be the prosecutor? and who so likely to be the prosecutors of an offence of this description, outraging decency and morals, as the master and mistress of the house in which it was committed? The principal matter to be considered is the natural effect of the statement upon the mind of the person addressed; and if so, who is so likely to have influence over the mind of a maid-servant as her mistress? And, both in Mr. Joy's book (p. 11) and also in Mr. Greave's Edition of Russell on Crimes (vol. 2, p. 839), persons who stand in the relation of master or mistress to a servant, are included in the category of those who have such authority as to render an inducement held out by them fatal to the admission of confessions so obtained.

WILLIAMS, J., referred to *R. v. Parratt* (4 Car. & P. 570),

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where threats used by the captain of a vessel to one of his crew to induce him to confess who his partner was in the stealing of a watch, were held to exclude the confession.

PARKE, B.—In 2 Russ. on Crimes, 839, the principle is said to be—"That all who are engaged in the apprehension, prosecution, or examination of a prisoner are considered as persons of such authority, that their inducements will exclude any confession thereby obtained." The particular cases mentioned are put as illustrations only.

Oreasy.—Surely the master and mistress of the house, where an offence of this sort has been committed, are persons engaged in the prosecution.

Cur. adv. vult.

Judgment.

PARKE, B., now delivered the judgment of the Court.—After stating the facts of the case as above, he said that the cases on this subject had gone quite far enough, and, in the opinion of the judges, ought not to be extended. The judge who presided had, of course, to decide these questions respecting the admissibility of confessions in the first instance; and it would have been better if they had been left altogether to his decision upon his own view of all the circumstances of each particular case. A rule, however, had been entertained that confessions made in consequence of inducements or threats held out by persons in authority were inadmissible: and all those who were engaged about the prosecution or apprehension of a person charged, might be regarded certainly as persons in authority; and, amongst others, the master or mistress of a servant might be a person in such authority, that their inducement would include a confession, as in the case of *R. v. Upchurch* and others cited during the argument, and in that of *R. v. Warringham* (15 Jur. 318.) In those cases, however, the offences charged involved some injury to the master and mistress, so as to connect them necessarily with the prosecution. In the present case the offence was not in any respect an offence against the mistress; and the Court, therefore, were of opinion that the mistress was not a person in such authority, that the advice which she gave to the prisoner was sufficient to exclude the confession.

Conviction affirmed.

OXFORD CIRCUIT.

MONMOUTH SPRING ASSIZES, 1852.

March 26.

(Before Mr. Justice WIGHTMAN.)

REG. v. BAROISSE AND ANOTHER. (a)

False Pretences—Evidence to negative—Variance—Power to amend indictment under the statute 14 & 15 Vict. c. 105, s. 1.

An indictment against A. Z. and G. B., for false pretences, alleged that the defendants falsely pretended to one A. W. that a certain vessel, called The Castenet, then was in Penarth Road (meaning a certain part of the Bristol Channel), and that the said A. Z. then was the master, and the said G. B. then was the mate of the said vessel, and that they the said G. B. and A. Z. then wanted the sum of 8l. to pay for the pilotage of the said vessel, whereas, in truth and in fact, a certain vessel, called The Castenet, was not then in the Penarth Road, and whereas the said A. Z. was not then master, and the said G. B. was not then mate, of such vessel.

Held, that the negative of the pretence that the defendants were respectively the master and mate of a vessel was sufficiently shown by proof that no vessel had arrived in the port, or had been heard of, answering the defendant's description; the pretence set out having been accompanied by a statement by the defendants that they expected the vessel in three days.

No evidence having been given that the defendants called the alleged vessel by any name:

Semble, that the court had power, under the 14 & 15 Vict. c. 100, s. 1, to amend the indictment, by striking out the words "called The Castenet."

THE prisoners, George Baroissee and Anthony Zaine were indicted for obtaining money by means of false pretences.

The first count of the indictment alleged that the defendants did falsely pretend to one Aaron Wilbraham "That a certain vessel, called the Castenet, then was in Penarth Road (meaning a certain part of the Bristol Channel), and that the said Anthony Zaine then was the master and the said George Baroissee then was the mate of the said vessel, and that they, the said George Baroissee and Anthony Zaine, then wanted the sum of three pounds to pay for the pilotage of the said vessel; whereas, in truth and in fact a certain

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vessel called the *Castenet* was not then in the Penarth Road, and whereas the said Anthony Zaine was not then master, and the said George Baroissee was not then mate of such vessel, by means whereof the said George Baroissee and Anthony Zaine obtained a certain sum of money, to wit—the sum of three pounds of the moneys of the said Aaron Wilbraham, with intent to defraud.

A second count alleged that the defendants did conspire, by divers subtle means and devices, and by false pretences, to obtain and acquire to themselves the money of the said Aaron Wilbraham, and to cheat and defraud him thereof against the peace, &c.

Vaughan for the prosecution.

Hunt, at the request of the Court, watched the case on behalf of the defendants.

On the part of the prosecution it was proved that the defendants, on the 13th of March, 1852, went to the prosecutor's, Aaron Wilbraham's, who kept a public-house, and there ordered breakfast. While it was preparing the defendant Baroissee said to the prosecutor's wife that he expected a vessel to arrive in three days, and he wished to borrow three pounds to pay the pilot. The wife spoke to her husband when he came in, and the defendant repeated his application and statement, adding that he was the mate of the vessel and Zaine was the captain, and that the vessel was then in the Penarth Road, that the channel pilot had been discharged, and that they were short of money to pay the pilotage into the harbour. The defendant Zaine was in the house, but in another room when the representation was made. Zaine did not appear to understand English, and Baroissee spoke the language imperfectly. They were natives of Greece. In consequence of the representation of Baroissee the prosecutor advanced the three pounds, which were handed to Zaine. The defendants left the house and did not return.

Another witness said that Baroissee told him the same day that he expected a vessel, which he spoke of as the *Castenet*. The two defendants were found together when taken into custody on the 18th of March. It was proved by officers connected with the port that no Greek or other vessel, answering the description of the prisoner's supposed ship, arrived, or was heard of at Newport down to the present time; and after the defendants were in custody. Baroissee said that the vessel was expected at Swansea, and subsequently he said that there was no vessel at all.

At the close of the case for the prosecution,

Hunt, for the defendants, submitted that there was no evidence of privity between them. It was not shown that Zaine was in any way a party to the representation of Baroissee.

WIGHTMAN, J.—Yes; there is the receipt of the money by Zaine.

Hunt.—With respect to the first count there was this further objection, that the negative of the false pretence was not sufficiently proved. There was no evidence that the one defendant was not the master and that the other was not the mate of a vessel.

WIGHTMAN, J.—Only in this way, that there was no vessel at all

which they expected, or with which they were connected. There is no evidence, however, of the name of the vessel as alleged.

Vaughan.—The defendant Baroissee tells a witness that he expects a vessel called *the Castenet*.

WIGHTMAN, J.—Yes, on another occasion; but this is not a part of the false pretence for which the defendants are indicted. It is no part of the pretence to Wilbraham, and representations to other persons cannot be incorporated with it. The indictment may be amended however.

Hunt submitted that there was no power to amend the indictment in this respect. The statute 14 & 15 Vict. c. 100, s. 1, only empowered amendments in the name or description of any matter or thing whatsoever, "named or described" in the indictment, if the Court "shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits." The power of the Court did not extend to such an amendment as is sought to be made in this case, and, moreover, it cannot be said that a variance between the false pretence proved and that charged is not material to the merits of the case.

Huddleston (amicus curiæ).—A similar question as to the power to amend, was raised in a case tried at Stafford on the present circuit before Mr. Greaves, Q.C., sitting to try prisoners. (a) The false pretence charged in the indictment in that case was, that the defendant said he had been to a place in Derbyshire and had served an order in bastardy on a person named; but the proof was, that the defendant said he had been to the place and had left the order with the landlady of the inn to give to the person, he being then from home; and Mr. Greaves, after referring to the recent statute, held that the Court had no power to make the amendment, it not being within the terms of the act.

Vaughan.—Here the amendment sought to be made is to strike out the name of the vessel. Is not that an amendment clearly within the very words of the statute, "The name or description of any matter or thing whatsoever?"

WIGHTMAN, J.—I think I have the power to make this amendment. It comes within the words of the statute. The words "called the Castenet" must be erased from the indictment.

The amendment was accordingly made, by the officer of the Court striking out the above words.

WIGHTMAN, J.—Independently of this question, there is the count for conspiracy. That is not affected by the question as to the power to amend.

Hunt submitted that as to that count there was no evidence for the jury of a conspiracy. There is no evidence of any statement by one of the defendants, and what the other said he could not understand.

WIGHTMAN, J.—That is not necessary. The question is, whe-

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(a) See this case (*Reg. v. Bailey*), reported *post*, vol. vi.

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ther they were acting in concert in pursuance of a previous arrangement. I think it will be better, in order to relieve the case of any difficulty as to the amendment, to withdraw the first count and leave the case to the jury on the count for conspiracy only.

Hunt then addressed the jury on that count.

WIGHTMAN, J. (to the Jury.)—The prisoners are indicted for conspiring to induce the prosecutor to part with the sum of three pounds. It is said that one of them cannot speak or understand English. It is impossible to say or know how that is; but that is not the important question in this case. The question is, whether the prisoners conspired together in their own language, and whether the representations made by the one were in pursuance of that conspiracy, and made by him acting in concert with the other. They appear at Newport together, and are found together; and it is very extraordinary that the vessel they made the representations about has not yet been seen or heard of.

Verdict—Guilty.

OXFORD CIRCUIT.

GLOUCESTER SPRING ASSIZES, 1852.

March 29.

(Before Mr. BARON PLATT.)

REG. v. WHITE. (a)

Practice—Depositions before a coroner—Statute 6 & 7 Will. 4, c. 114.

Depositions taken before a coroner are within the statute 6 & 7 Will. 4, c. 114, s. 3, which requires copies of depositions to be furnished on application to prisoners at the rate of charge therein provided; and a coroner who demands more is guilty of extortion in his office.

HUDDLESTON, on the part of the prisoner, applied to the Court for a copy of the depositions taken before the coroner, and returned to this court. The application was made under these

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

circumstances—The prisoner, Richard White, was charged with manslaughter on the coroner's inquisition ; and an application had been made by the prisoner's attorney for copies of the depositions under the statute of 6 & 7 Will. 4, c. 114. The coroner refused to furnish them on the terms stated in the statute, namely—three halfpence for every folio of ninety words ; and demanded a much larger sum, amounting to several pounds, contending, it seems, that the statute did not apply to depositions taken by coroners. The Act of Parliament, however, was very general in its terms, and it was difficult to see how depositions before the coroner could be held not to be included in its terms. The section of the statute (6 & 7 Will. 4, c. 114, s. 3) enacted, " that all persons who, after the passing of this Act, shall be held to bail or committed to prison for any offence against the law, shall be entitled to require and have on demand (from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same,) copies of the examinations of the witnesses respectively, upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words : provided always, that if such demand shall not be made before the day appointed for the commencement of the assizes or sessions, at which the trial of the person on whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial ; but it shall nevertheless, be competent for such Judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged." It was very desirable that the question should be determined, as it was very generally felt in the country as a grievance, that coroners refused to give copies of depositions except on their own terms. In this case he had to request that the Court to which the depositions were now returned, would order a copy to be furnished on the terms provided by the statute.

PLATT, B., after referring to the section of the act, said he was clearly of opinion that depositions before coroners were within it. It was a pity that the sum demanded was not paid under protest, and the coroner indicted for extortion in his office, or an action brought against him. The Clerk of Assize would not supply a copy.

REG.
v.
WHITE.
—
1852.

Coroner's
depositions—
Statute 6 & 7
Will. 4, c. 114.

APPENDIX.

STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW PASSED IN THE SESSION OF
PARLIAMENT OF 1850.

UNION OF LIBERTIES WITH COUNTIES ACT.

13 & 14 VICT. CAP. 105.

An Act for facilitating the Union of Liberties with the Counties in which they are situate.—[14th August, 1850.]

IV. **A**ND be it enacted, that from and after the time mentioned in any such order of union for the union of any liberty with the county in which it is situate, under the provisions of this act, save so far as otherwise directed by such order, and subject to the provisions thereof, such liberty shall be taken to be in all respects part of the county to which the same is united under such order, and shall be subject to the jurisdiction of the justices of such county, and the jurisdiction and powers of any justices under any separate commission of the peace theretofore issued for such liberty shall cease, and no separate commission of the peace shall be issued, and no separate sessions of the peace shall be holden for any such liberty, any law, statute, letters patent, grant, or charter whatsoever to the contrary notwithstanding; and the sessions to be holden in and for the county shall have full jurisdiction over all things cognizable by the sessions for the liberty, and the caption and venue in every indictment or other proceeding shall be in the county, without naming the liberty; and the inhabitants of the liberty shall, being duly qualified to serve upon juries under the provisions of an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled *An Act for consolidating and amending the Laws relating to Jurors and Juries*, be returned and be liable to serve on juries at the sessions of the peace for the county.

V. And be it enacted, that unless otherwise directed by the order of union, and subject to the provisions thereof, the gaol belonging to the

13 & 14 Vict.
c. 105.

*Union of
Liberties with
Counties Act.*

After union
no separate
commission
of the peace
to issue for
liberty.

Sessions for the
county to have
jurisdiction in
liberty.

Inhabitants of
liberty to serve
on juries for the
county.

Gaol of liberty
to become gaol
of county.

13 & 14 Vict.
c. 105.

*Union of
Liberties with
Counties Act.*

Prisoners to be
tried at sessions
for united
county and
liberty, and,
where neces-
sary, at assizes.

Interpretation
of terms.

liberty shall upon the union of the liberty with the county be a common gaol for the county, and shall be under the control and management of the justices of such county; and all laws and enactments in force with respect to a county gaol, or to persons imprisoned in a county gaol, shall be in force with respect to any and every gaol at the time of such union belonging to the liberty, and to the persons imprisoned therein.

VI. And be it enacted, that, save where otherwise directed by the order of union, and subject to the provisions and directions thereof, every person who shall at the time of the union stand committed to take his trial at any court of gaol delivery, general or quarter sessions of the peace, for the liberty, charged with any offence which the justices of the liberty would have had jurisdiction to try, shall take his trial at the next court of quarter sessions for the county to which such liberty is united, if the offence is cognizable by a court of quarter sessions, and if not, then before the judges of Oyer and Terminer and Gaol Delivery at their next circuit; and all persons bound by recognizance to prosecute and give evidence against such offenders shall be bound to appear to prosecute and give evidence at the court at which such offenders shall be tried as aforesaid; and all such recognizances, and all depositions relating to such charges, shall be transmitted to the proper officer of the court where such offenders shall be tried; and the sheriff, under-sheriff, gaolers, and other officers of the county in which such offenders shall be so tried are hereby authorized and required in every such case to receive every prisoner delivered into the custody of the sheriff or removed to the gaol of the county, and him safely keep until delivered in due course of law: and the judges of assize and others named in Her Majesty's Commission of Oyer and Terminer and Gaol Delivery, or the justices of the county, as the case may be, in which such offenders shall be tried, are hereby authorized and required to hear and determine all such cases, and to order the payment of the usual and fit expenses of the prosecutors and witnesses, and all other costs and expenses which in like case may be directed to be paid by order of court.

IX. And be it enacted, that in this act the word "liberty" shall be taken to mean also division of a county, town and county, and soke; and the word "gaol" shall be taken to mean also prison or house of correction; and in describing any person or thing any word importing the singular number shall be construed to mean also several persons or things respectively, unless there be something in the subject or context repugnant to such construction.

PRECEDENTS.

No. I.

Indictment under 8 & 9 Vict., c. 126, s. 53, against a medical practitioner for untruly stating certain particulars in a medical certificate relating to a lunatic.

LINCOLNSHIRE, } The jurors for our Lady the Queen upon
to wit. } their oath present, that E. D., late of the parish
of Wornfleet, in the County of Lincoln, surgeon and apothecary, not
regarding the laws of this realm, but wrongfully contriving and intend-
ing to procure one S. L. to be received as a lunatic patient into a certain
lunatic asylum called the Lincoln Lunatic Asylum, contrary to the laws
relating to lunatics, heretofore and after the making, passing and coming
into operation of a certain act of Parliament made and passed in a session
of Parliament, holden in the 8th and 9th years of the reign of Her present
Majesty Queen Victoria, intituled, *An Act to amend the Laws for the
Provision and Regulation of Lunatic Asylums for Counties and Boroughs,
and for the Maintenance and Care of Pauper Lunatics in England*, and
whilst the said E. D. was such surgeon and apothecary as aforesaid, to wit,
on the 20th day of December, A.D. 1850, at the parish aforesaid, in the
county aforesaid, unlawfully, knowingly, and in order to procure the said
S. L. to be received into the said asylum, did sign a certain medical cer-
tificate, then and there dated by him, the said E. D., on the day and year
aforesaid, and intended by the said E. D. to be taken and received as a
medical certificate of him the said E. D., relating to, and of and concern-
ing the said S. L., as an insane person, according to the form, and con-
taining the particulars required in schedule E. No. 2, annexed to the said
act, and as and for the medical certificate of him the said E. D., as a
surgeon and apothecary, under and in pursuance of the provisions of the
said act, and, as a medical certificate, to accompany a certain order and
statement concerning the said S. L., according to the form and containing
the particulars required in the said schedule E. No. 2, to the said act
annexed, which said medical certificate, so signed by the said E. D. as
aforesaid, then and there was and is as follows, that is to say:—

“Medical Certificate in the case of a Private Patient.

“I, E. D., being an apothecary, surgeon, &c., duly authorized to practice
as such, hereby certify that I have this day, separately from any other
medical practitioner, visited and personally examined S. L., of
(meaning the said S. L.), the person named in the accompanying
statement and order, and that the said S. L. is an insane person and a
proper person to be confined, and that I have formed this opinion from

STATEMENT.

Precedents.

		No. I.
Name of patient, with Christian name at length ...	S. L.	Indictment
Sex and age	Male, age forty.	against medical
Married, single, or widower	Married.	practitioner for
Condition of life, and previous occupation	Small farmer.	untruly stating
Previous place of abode... ..	Friskney.	particulars in
		certificate.
Religious persuasion so far as known	Protestant mem-ber of the Church of England.	
Duration of existing attack	About six weeks.	
Whether the first attack	The first attack.	
Age (if known) on first attack	_____	
Whether subject to epilepsy	Not subject.	
Whether suicidal	Inclined.	
Whether dangerous to others... ..	Rather, at times.	
Previous places of confinement (if any)	None.	
Whether found lunatic by inquisition, and date of commission... ..	_____	
Special circumstances (if any) preventing the insertion of any of the above particulars	_____	

Signed (name) J. L., jun.

Dated this 23rd day of December, one thousand eight hundred and fifty.

To Mr. Francis D. Walsh,
House Surgeon and Medical Superintendent,
Lincoln Lunatic Asylum.

And which said certificate of the said E. D. then and there was and is as follows, that is to say :—

“ Medical Certificate in the case of a Private Patient.

“ I, E. D., Warnfleet, All Saints, being an apothecary, surgeon, &c., duly authorized to practice as such, hereby certify that I have this day, separately from any other medical practitioner, visited and personally examined S. L., of Friskney, the person named in the accompanying statement and order, and that the said S. L. is an insane person and a proper person to be confined, and that I have formed this opinion from the following fact, viz., that he is incapable of managing his affairs and a dangerous person.

“ Signed (name) E. D., Surgeon, &c.

“ Place of abode, Warnfleet, All Saints.

“ Dated this 20th day of December, 1850.”

And which said certificate of the said S. B. then and there was and is as follows, that is to say :—

“ Medical Certificate in the case of a Private Patient.

“ I, S. B., being an apothecary and surgeon, being duly authorized to practice as such, hereby certify that I have this day, separately from any other medical practitioner, visited and personally examined S. L., of Friskney, the person named in the accompanying statement and order, and that the said S. L. is an insane person, and a proper person to be confined, and that I have formed this opinion from the following fact, viz., he is incapable of managing his affairs and a dangerous person.

“ Signed (name), S. B.

“ Place of abode, Northolme.

“ Dated this 20th day of December, 1850.”

Precedents.

No. I.
Indictment
against medical
practitioner for
untruly stating
particulars in
certificate.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. D. unlawfully, and whilst he was a surgeon and apothecary, signed the said medical certificate in this count mentioned, so alleged to have been signed by him as aforesaid, to wit, on the said 20th day of December, A. D. 1850, at the parish of Warnfleet aforesaid, in the county of Lincoln aforesaid, he the said E. D. then and there, and at the time he so signed the said certificate as aforesaid, well knowing, as the fact was and is, that the said certificate then and there, and at the time the said E. D. so signed the same as in this count aforesaid, untruly stated certain particulars required by the said act in manner hereinafter mentioned, that is to say in this, that at the time the said E. D. so signed the said certificate, the said S. L. mentioned in the said certificate was not named in an accompanying statement and order as in and by the said medical certificate it was untruly stated. And whereas, in truth and in fact, at the time the said E. D. so signed the said certificate as aforesaid, there was not in existence any such accompanying statement and order as in and by the said certificate it was untruly stated as aforesaid, as the said E. D., at the time he so signed the same as aforesaid, well knew. And whereas, in truth and in fact, the said statement and order mentioned in the said certificate had not been made or signed by any person whatsoever at the time the said E. D. so signed the said last-mentioned certificate, as the said E. D., at the time he so signed the said certificate as aforesaid, well knew; and whereas, in truth and in fact, the said order had not, at the time the said E. D. so signed the said certificate as aforesaid, been signed by the said J. L., or any person whatever, and was not signed by the said J. L. until the said 23rd day of December, 1850, and long after the said E. D. so signed the said certificate. And so the jurors aforesaid, upon their oath aforesaid, do say that the said E. D., on the said 20th day of December, A.D. 1850, at the parish of Warnfleet aforesaid, in the county aforesaid, unlawfully, wrongfully, and knowingly did sign the said medical certificate in this count mentioned in that behalf as aforesaid, the said certificate then and there, and at the time the said E. D. so signed the same as aforesaid, untruly stating the particulars in this count mentioned in that behalf as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Third count.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, and after the making, passing, and coming into operation of the said act of Parliament, to wit, on the 23rd day of December, A. D. 1850, one J. L., under and in pursuance of the provisions of the said act of Parliament, and for the purpose of procuring the said S. L. to be received as a lunatic patient into a certain lunatic asylum called and known by the name of the Lincoln Lunatic Asylum, duly delivered and caused to be delivered to one F. D. Walsh, then and there being medical superintendent of the said asylum, and having authority to receive lunatic patients into the same, a certain order relating to the said S. L. as an insane person, under the hand of the said J. L., according to the form and containing the particulars required in schedule E. No. 2, to the said act annexed, the said order then and there having annexed thereto, and being accompanied by, the medical certificate of the said E. D., and the medical certificate of the said S. B., each thereof then and there being surgeons and apothecaries, which said certificates, then and there, were according to the form, and containing the particulars required in the said schedule E., annexed to the said act,

and were respectively signed by the said E. D. and the said S. B., as surgeons and apothecaries, they not then being in partnership on the 20th day of December, A.D. 1850, which said order, containing such particulars as aforesaid, then and there was and is as follows (that is to say) (*set forth order and statement as in 2nd count.*) And which said certificate of the said E. D., then and there was and is as follows: (that is to say) (*here set forth the certificate of E. D., inserting after the name of the insane person where it first occurs, the words "meaning the said S. L."*) And which said certificate of the said S. B., then and there was and is as follows (that is to say) (*set forth the certificate as in 2nd count.*) And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. D., unlawfully, and whilst he was a surgeon and apothecary, signed the said certificate in this count mentioned, so alleged to have been signed by him as aforesaid, to wit, on the said 20th day of December, A.D. 1850, at the parish aforesaid, in the county aforesaid, he the said E. D., then and there, and at the time he so signed the same certificate as aforesaid, well knowing, as the fact was and is, that the said certificate then and there, and at the time the said E. D. so signed the same as in this count aforesaid, untruly stated certain particulars required by the said act, in manner hereinafter mentioned (that is to say) in this: That the said E. D. had not, in the day he so signed and dated the said certificate, or at any time whatsoever, separately from another medical practitioner, or in any manner whatsoever, visited or personally examined the said S. D. And whereas, in truth and in fact, the said E. D. did not, on the said 20th day of December, A.D. 1850, under any circumstances whatsoever, visit or personally examine the said S. L., as in and by the said certificate, so signed by the said E. D., it was so untruly stated as aforesaid; and as he the said E. D., at the time he so signed the said certificate, well knew; and so the jurors aforesaid, upon their oath aforesaid, do say that the said E. D., on the said 20th day of December, A.D. 1850, at the parish of Warnfleet aforesaid, in the county aforesaid, unlawfully, wrongfully, and knowingly, did sign the said certificate, in this count and in that behalf mentioned as aforesaid, the said certificate then and there, and at the time the said E. D. so signed the same as in this count mentioned, untruly stating the particulars, in this count alleged in that behalf as aforesaid, in contempt of our said Lady the Queen, and her laws, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. D., not regarding the laws of this realm, heretofore and after the making, passing and coming into operation of the said act of Parliament mentioned and recited in the first count of this indictment, to wit, on the 23rd day of December, A.D. 1850, at the parish of Warnfleet aforesaid, in the county of Lincoln aforesaid, unlawfully, knowingly and wrongfully did put, place, and confine one S. L., not then being a pauper or a person wandering within any district, parish or union, and deemed to be a lunatic, nor a person deemed to be a lunatic, and then under the care of a relative, or any other person, who neglected or cruelly treated him, so that he was not taken care of, in a certain lunatic asylum situate in the parish aforesaid, in the county aforesaid, called and known by the name of the Lincoln Lunatic Asylum, and then and there unlawfully, knowingly, and wrongfully did cause the said S. L. to be received as a lunatic patient into and within the said asylum

Precedents.

No. I.
Indictment
against medical
practitioner for
untruly stating
particulars in
certificate.

Fourth count.

Precedents.
 No. I.
 Indictment
 against medical
 practitioner for
 untruly stating
 particulars in
 certificate.

without the medical certificate relating to the said S. L., signed by any two persons whatever, who had then personally examined the said S. L., but with the medical certificate relating to the said S. L., signed by one surgeon and apothecary only who had then personally examined the said S. L. (that is to say), of one S. B. And the jurors aforesaid, upon their oath aforesaid, do further present that at the time the said S. L. was so received into the said asylum there were no special circumstances whereby, or under which, or by reason thereof the said S. L. could or might be lawfully received into the said asylum as aforesaid upon the certificate of one physician, surgeon, or apothecary alone, nor was the said S. L. received into the said asylum as aforesaid with any order or other document whatsoever, stating any special circumstances which had prevented, or could prevent, the said S. L. from being examined by two medical practitioners, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

No. II.

Indictment against two persons for conspiracy to procure the defilement of a young female.

THE jurors of our Lady the Queen upon their oath present, that W. G. Smith, late of the parish of Lambeth, in the county of Surrey, and within the jurisdiction of the said court, labourer, and Frances Foreman (otherwise called Fanny Foreman), late of the same place, single woman, being evil-disposed persons, and contriving, and wickedly and unlawfully intending to debauch, corrupt and procure the defilement of one Mary Ann Luttmann, and to injure and aggrieve her, the said Mary Ann Luttmann, heretofore and after the passing of an act of Parliament made and passed in the session of Parliament holden in the 12th and 13th years of the reign of Her present Majesty Queen Victoria, intituled, *An Act to Protect Women from Fraudulent Practices for Procuring their Defilement*, to wit, on the 1st day of February, in the thirteenth year of the reign of her said Majesty, in the parish aforesaid in the county aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, combine, confederate and agree together, unlawfully against the statute in that behalf, by divers false pretences, false representations and other fraudulent means, to procure a certain person, to wit, one Mary Ann Luttmann, then and there being a child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connexion with a man, to wit, the said W. G. Smith, and that afterwards, to wit, on the day and year aforesaid at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, the said Frances Foreman, otherwise called Fanny Foreman, in pursuance of the said conspiracy and agreement, unlawfully and by certain false pretences, false representations and other fraudulent means, to wit, by then and there

falsely and fraudulently pretending and representing to the said Mary Ann Luttmann, that she the said Frances Foreman, otherwise called Fanny Foreman, was desirous of employing, and would employ her the said Mary Ann Luttmann to do certain work for the said W. G. Smith for hire and reward to her the said Mary Ann Luttmann, and by persuading and inducing her the said Mary Ann Luttmann by means of such false pretences and representations to accompany her the said Frances Foreman, otherwise called Fanny Foreman, to the house of the said W. G. Smith, did procure the said Mary Ann Luttmann then and there to have illicit carnal connexion with the said W. G. Smith, to the great damage, &c., of the said Mary Ann Luttmann, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Precedents.
No. II.
Indictment
against two
persons for
conspiring to
procure the
defilement of a
young female.

No. III.

Indictment for conspiracy to defeat the course of public justice, by giving false evidence, and suppressing facts, on an inquiry into a charge of felony, before a magistrate.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit, } upon their oath present, that before
the commission of the offence by W. C. and R. C., hereinafter mentioned to have been committed by them, one F. S. had been charged before J. T., Esq., one of the magistrates of the police courts of the metropolis, sitting at the police court, Greenwich, in the county of Kent, and within the metropolitan police district, on suspicion of having committed a certain felony, to wit, of having feloniously broken and entered the dwelling-house of one J. M., and stolen therein divers goods, chattels, and moneys of the said J. M. And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time of the commission of the offence hereinafter alleged to have been committed by the said W. C. and R. C., to wit, on the 30th day of September, in the year of our Lord 1850, at the parish of Greenwich, in the county of Kent, they the said W. C. and R. C. knew and were acquainted with divers matters, facts, circumstances, and things material to be inquired into by the said J. T., as such magistrate as aforesaid, and touching and concerning the said charge and the said subject-matter thereof, all and every of which said matters, facts, circumstances, and things it then and there was the duty of the said W. C. and R. C. to make known and reveal to the said J. T., as such magistrate as aforesaid, and which they the said W. C. and R. C. were then and there required on Her Majesty's behalf by the said J. T., as such magistrate as aforesaid, to make known, discover, and reveal to him the said J. T., as such magistrate as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. C., late of the parish of Greenwich, in the county of Kent, labourer, and R. C., late of the same place, labourer, being evil disposed persons, and contriving and intending as much as in

Precedents.

No. III.
Indictment for
conspiracy by
giving false
evidence.

them lay to pervert the due course of law and justice, and not regarding their said duty in that behalf, on the said 30th day of September, in the year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully did conspire, combine, confederate, and agree together to deceive the said J. T., so being such magistrate as aforesaid, in the premises, and to withhold and conceal from the said J. T. the said matters, facts, circumstances, and things, and falsely to represent to the said J. T., so being such magistrate as aforesaid, that they and each of them the said W. C. and R. C., were ignorant of all the said several matters, facts, circumstances, and things, and falsely to swear before the said J. T., to the effect last aforesaid, and by such false swearing, and divers deceitful, false, and indirect means, ways, and methods, to perfect and put into effect the said wicked conspiracy, combination, confederacy, and agreement, and to procure the said J. T., as such magistrate as aforesaid, to dismiss the said charge, and mutually to aid and assist one another in perfecting and putting in execution the said wicked conspiracy, combination, confederacy, and agreement, in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. C., on the said 30th day of September, in the year aforesaid, at the parish of Greenwich aforesaid, in the county of Kent aforesaid, unlawfully did conspire, combine, confederate, and agree together, and with divers other persons, whose names to the jurors aforesaid are unknown, wilfully and corruptly to give false evidence, and wilfully and corruptly to swear that which was false, upon the examinations upon oath of them the said W. C. and R. C. before the said J. T., Esq., then being one of the magistrates of the police courts of the metropolis, acting at one of the said courts, to wit, at the Greenwich police court, in the county of Kent, touching and concerning a certain charge then depending before the said J. T., to wit, a charge against one F. S., of having feloniously broken and entered a certain dwelling-house of one J. M., and stolen therein divers goods, chattels, and moneys of the said J. M., to the great and pernicious example of all others in the like case offending, in contempt of our said Lady the Queen and her laws, to the manifest perversion of public justice, and against the peace of our said Lady the Queen, her crown and dignity.

No. IV.

Indictment under the 8 & 9 Vict. c. 100, s. 59, against a physician keeping a lunatic asylum, for making false entries in the "Medical Visitation Book," required by that section to be kept by him.

KENT, } The jurors for our Lady the Queen upon their oath
to wit. } present, that heretofore and after the making, passing, and
coming into operation of a certain act of Parliament made and passed in

a certain session of Parliament, holden in the eighth and ninth years of the reign of Her present Majesty Queen Victoria, intituled, *An Act for the Regulation of the Care and Treatment of Lunatics*, to wit, at the General Quarter Sessions of the Peace of our Lady the Queen, holden at Maidstone, in and for the county of Kent, on the 9th day of April, in the year of our Lord 1850, three of Her Majesty's justices of the peace, to wit, the Right Honourable Charles, Earl of Romney, John Wingfield Stratford, and Daniel Scrutton, then acting in and for the county of Kent, in the said quarter sessions assembled, according to and in pursuance of the form of the statute in such case made and provided, by licence under their hands and seals, bearing date the said 9th day of April, in the year of our Lord 1850, did authorize and empower one A. B. M., of West Malling, in the county of Kent, Doctor of Medicine, to use and employ a certain house and premises situate at West Malling aforesaid, in the said county, for the reception of twenty-one male and thirty-one female lunatics, of whom not more than forty-three were to be private patients, for the space of thirteen calendar months from the said date of the said licence, which said licence, during all the days and times hereinafter in this count mentioned, was in full force and effect.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. M., being a physician, afterwards and whilst he was such physician, upon the day of the said licence, and from thence until and at the time of the committing of the offence hereinafter next mentioned, did keep and reside in the said house so licensed as aforesaid, and did use and employ the same for the reception of lunatic patients, under and in pursuance of the said licence.

And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time of the commission of the offence hereinafter next mentioned, there was kept in the said house the book called the Medical Visitation Book, required by the said act of Parliament for the purpose of there being entered therein from time to time such report as in and by the said recited act of Parliament is required. And the jurors aforesaid, upon their oath aforesaid, do further present, that between the 10th day of August, in the year of our Lord 1850, and the 15th day of the same month, in the year aforesaid, there were placed under mechanical restraint in the said house divers patients, male and female, during all that time being lunatic patients in the said house, to wit, S. S. H. S., R. H. D., J. A., S. N., C. B., M. A. E., and B. M. B. And the jurors aforesaid, upon their oath aforesaid, do further present, that on the said 15th day of August, in the year of our Lord 1850, the said A. B. M., being then and there a physician so keeping and residing in the said house, in pursuance of the said statute, and according to the form in Schedule H., annexed to the same, did enter and sign in the said book, called the Medical Visitation Book, the report of him the said A. B. M., bearing date the day and year last aforesaid, and as and for the report of the said A. B. M., as such resident physician, keeping the said house as aforesaid, showing the number, sex, and state of health of the patients then in such house, the names of patients who had been under restraint or in seclusion in the said house since the said 10th day of August then instant, the condition of the said house, and the deaths, injuries, and violences to patients which had happened in the said house since the then last preceding report, signed and entered in the said book. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. M., being then and there such physician as

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Indictment
against a
physician
keeping a
lunatic asylum
for making false
entry in "Visi-
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 tation Book"

aforesaid, and so keeping and residing in the said house, so licensed as aforesaid, well knowing the said several lunatic patients in this count mentioned to have been so restrained as aforesaid, then and there, to wit, on the said 15th day of August, in the year of our Lord 1850, at the parish of West Malling aforesaid, in the county of Kent aforesaid, unlawfully and untruly did enter a certain matter and thing in the said report so signed and entered on that day as aforesaid, that is to say, in substance and to the effect following: that since the said 10th day of August, in the year of our Lord 1850, there had been no patients, either male or female, under restraint in the said house, which said false matter and thing, contained in the said report, then and there was dated the said 15th day of August, in the year of our Lord 1850, and had reference to all the periods which had elapsed between the said 10th day of August and the said 15th day of August then instant, and then and there was and is as follows, that is to say, the words "None" written under the words "Males" and "Females" respectively, in that part of the said form in Schedule H., to the said act annexed, which is as follows:—

Number of Patients under Restraint, and by what Means, or in Seclusion.

Males.	Females.

Against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. M., being a physician, and the keeper of and resident in a certain house, situate at West Malling, in the county of Kent, duly licensed for the reception of lunatic patients, heretofore and after the making, passing, and coming into operation of the said recited act of Parliament, and whilst the said A. B. M. was such physician as aforesaid, and the keeper of and resident in the said house, and whilst the said house was so duly licensed as aforesaid, to wit, on the 1st day of September, in the year of our Lord, 1850, at the parish of West Malling aforesaid, in the county of Kent aforesaid, unlawfully, and untruly did enter in a certain weekly report of him the said A. B. M., then and there signed and entered by him in the Medical Visitation Book kept at the said house, according to the form in Schedule H., annexed to the said act of Parliament, a certain false matter and thing touching and concerning one of the particulars required by the said act to be entered in such report, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and after the making, passing, and coming into operation of the said act of Parliament recited in the first count of this indictment, and at the time of the commission of the offence herein-after next mentioned, to wit, on the 15th day of August, in the year of our Lord 1850, the said A. B. M. was a physician, keeping and residing

in a certain house at West Malling, in the said county of Kent, during all the days and times in this count mentioned, duly licensed for the reception of lunatic patients. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. M., being such physician as aforesaid, and so keeping and residing in the said house as aforesaid, whilst he was such physician, and so resident as aforesaid, to wit, on the said 15th day of August, in the year of our Lord 1850, at the parish of West Malling aforesaid, in the said county of Kent, did enter and sign in a certain Medical Visitation Book, then and there kept at the said house, under and in pursuance of the said act of Parliament, a certain report of him the said A. B. M., as such resident physician as aforesaid, and as and for the report required by the said act of Parliament to be entered in the said book according to the form in Schedule H., annexed to the said act, purporting to show, amongst other things, the number of patients then under restraint in the said house.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. M., so keeping and residing in the said house, so licensed as aforesaid, then and there, to wit, on the said 13th day of August, 1850, at the parish of West Malling aforesaid, in the said county of Kent, unlawfully and untruly did enter in the said report in this count mentioned, a certain false matter and thing, that is to say, did then and there untruly enter in the said report that there were then no lunatic patients under restraint in the said house, whereas, in truth and in fact, there were then divers lunatic patients there under restraint in the said house, and whereas, in truth and in fact, S. S., H. S., R. H. D., J. A., C. B., M. A. E., A. S., and B. M. B., then and there severally being lunatic patients in the said house, were at the time the said A. B. M. so unlawfully and untruly entered the said matter and thing in the said report, as in this count mentioned, under restraint in the said house, to the knowledge of the said A. B. M., against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Precedents.

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entry in "Visi-
tation Book."

STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW PASSED IN THE SESSION OF
PARLIAMENT OF 1851.

APPRENTICES AND SERVANTS PROTECTION ACT.

14 VICT. CAP. 11.

An Act for the better Protection of Persons under the Care and Control of others as Apprentices or Servants; and to enable the Guardians and Overseers of the Poor to institute and conduct Prosecutions in certain Cases.—[20th May, 1851.]

WHEREAS it is expedient to make provision for the better protection of persons who are under the care and control of others as apprentices or servants : be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same.

Persons refusing or neglecting to supply necessary food to apprentices or servants, or unlawfully assaulting them, guilty of a misdemeanor.

I. That where the master or mistress of any person shall be legally liable to provide for such person, as an apprentice or as a servant, necessary food, clothing, or lodging, and shall wilfully and without lawful excuse refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully and maliciously assault such person whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years.

Costs of prosecution.

II. That the costs and expenses of the prosecution of any such misdemeanor as aforesaid may be allowed and ordered by the court before which the indictment shall be tried, in like manner as the costs of the prosecution in certain cases of misdemeanor under the act of the seventh year of the reign of King George the Fourth, chapter sixty-four, or may be allowed and ordered by the court of Queen's Bench, in case the indictment shall have been removed into that court, to be paid by the treasurer of the county or other officer who would have been liable to pay under the order of the court in which, but for such removal, the indictment would have been tried.

A register to be kept of young persons hired or

III. That the guardians of every union and of every separate parish under the management of a board of guardians, and the overseers of every parish not in union or under the management of a board of guar-

dians, shall provide and keep a book or books, and shall cause to be registered therein the name of every young person under the age of sixteen who shall hereafter be hired or taken as a servant from the workhouse of such union or parish, together with the several other particulars specified in the schedule hereunto annexed; and every such entry shall be signed by the presiding chairman of such board of guardians at an ordinary meeting thereof, or by some one of such overseers; provided that nothing herein contained shall be taken to supersede or affect the obligation to keep such register of poor children apprenticed by overseers or guardians as is required by the statute of the forty-second year of King George the Third, chapter forty-six, and the statute of the eighth year of Queen Victoria, chapter one hundred and one.

IV. That where any young person under the age of sixteen shall have been or shall be hired or taken as a servant from the workhouse of any union or parish, or shall have been or shall be bound out as an apprentice by the guardians of any union, or the guardians or overseers of any parish, it shall be lawful for such guardians or overseers respectively, and they are hereby required, so long as such young person shall be under the age of sixteen, and shall be known to them to reside as servant or apprentice in the same service into which such young person shall have so gone as a servant from such workhouse or as such apprentice within such union or parish respectively, or within five miles of any part of such union or parish, to cause the relieving officer, or, where there is no relieving officer, then some other officer duly authorized for the purpose, to visit such young person at least twice in every year, and to report to them in writing whether he has found reason to believe that such young person is not supplied with necessary food, or is subjected to cruel or illegal treatment in any respect.

V. That where any young person under the age of sixteen shall hereafter be hired or taken as a servant from the workhouse of any union or parish, or shall be bound out as an apprentice by the guardians of any union, or by the guardians or overseers of any parish, and the residence of the master or mistress shall be more than five miles from any part of such union or parish, then a written notice of such hiring, taking, or binding, specifying the name and age of the apprentice or servant, and the name, description, and residence of such master or mistress, shall be forthwith sent from such guardians or overseers to the guardians or overseers of the union or parish in which such master or mistress shall reside; and thereupon it shall become the duty of such last-mentioned guardians or overseers to cause the particulars contained in such notice to be registered in some book or books, to be provided by them for the purpose, together with the name of the union or parish from which such notice shall have been received; and such last-mentioned guardians or overseers shall cause such young person to be visited as frequently and in the same manner in all respects as if such young person had been hired or taken from their own workhouse, or had been bound out as an apprentice by themselves.

VI. That where any complaint shall be made of an offence against this act, or of any bodily injury inflicted upon any poor person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount in point of law to a felony or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom the examination is taken shall certify under their hands that they deem it

14 Vict. c. 11.

*Apprentices and
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Protection Act.*

taken as servants from any workhouse.

Not to supersede obligation to register as required by 42 Geo. 3, c. 46, and 7 & 8 Vict. c. 101.

Young persons hired from workhouses or bound out as pauper apprentices to be visited periodically by officer of guardians or overseers.

As to young persons hired or bound to masters residing at a distance from unions or parishes.

Guardians and overseers authorized and required to prosecute in certain cases.

14 Vict. c. 11. necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or of the parish, or where there are no guardians by the overseers of the parish, in which the offence shall have been committed, such guardians or overseers, as the case may be, shall, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians, or upon any one of such overseers, conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of the court trying the indictment, or of the Court of Queen's Bench), out of the common fund of the union, or out of the funds in the hands of the guardians or overseers (as the case may be) of such parish.

Costs of prosecution.

Justice empowered to bind over officer of guardians or an overseer to prosecute.

Interpretation of terms.

Extent of act.

VII. That in the case of a union or parish under a board of guardians the clerk or some other officer of such union or parish, and in the case of a parish not under a board of guardians one of the overseers thereof, may, if two such justices of the peace before whom the examination is taken shall deem it necessary for the purposes of public justice and shall certify as hereinbefore mentioned, be bound over to prosecute.

VIII. That the words "guardians," "union," "overseers," "justice of the peace," "officer," "poor," "parish," and "workhouse," used in this act, shall be construed in like manner as in the act of the fifth year of the reign of King William the Fourth, chapter seventy-six.

IX. That this act shall extend only to England and Wales.

SCHEDULE.

FORM OF REGISTER.

Name of Child.	Age.	Date of hiring or taking as Servant.	Name of Master or Mistress.	Trade or other description of Master or Mistress.	Residence of Master or Mistress.

PREVENTION OF OFFENCES ACT.

14 & 15 VICT. CAP. 19.

An Act for the better Prevention of Offences.—[3rd July, 1851.]

WHEREAS it is expedient to make further provision for the prevention of burglary and other offences in the night: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: That—

I. If any person shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever with intent to break or enter into any dwelling house or other building whatsoever and to commit any felony therein, or if any person shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock key, crow, jack, bit, or other implement of housebreaking, or if any person shall be found by night having his face blackened or otherwise disguised, with intent to commit any felony, or if any person shall be found by night in any dwelling house or other building whatsoever with intent to commit any felony therein, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned, with or without hard labour, for any term not exceeding three years.

II. If any person shall be convicted of any such misdemeanor as aforesaid committed after a previous conviction, either for felony or such misdemeanor as aforesaid, such person shall on such subsequent conviction be liable, at the discretion of the court, to be transported beyond the seas for any term not less than seven years and not exceeding ten years, or imprisoned, with or without hard labour, for any term not exceeding three years; and in any indictment for such misdemeanor committed after a previous conviction as aforesaid it shall be sufficient to state that the offender was at a certain time and place convicted of felony or misdemeanor against "The Act for the better Prevention of Offences, 1851," (as the case may be) without otherwise describing the previous felony or misdemeanor; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken,) shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same.

III. And whereas it is expedient to make further provision for the punishment of persons using chloroform or other stupefying things in order the better to enable them to commit felonies: be it enacted, that if any person shall unlawfully apply or administer, or attempt to apply or

Any person found by night armed, &c. with intent to break into any house and commit any felony therein, or having in his possession, without lawful excuse, any implements of housebreaking, or having his face disguised, or being found by night in any house with intent to commit any felony therein, shall be guilty of a misdemeanor.

Any person convicted of such misdemeanor after a previous conviction of felony or such misdemeanor, guilty of such misdemeanor, &c.

Form of indictment.
Certificate of previous conviction.

Persons using chloroform, &c. in order to commit a felony, guilty of felony.

14 & 15 Vict.
c. 19.

*Prevention of
Offences Act.*

Persons
inflicting
grievous bodily
harm guilty of a
misdemeanor,
and liable to
three years
imprisonment.

Not to repeal
sect. 29, of 10
Geo. 4, c. 34.

On the trial of
any indictment
for feloniously
cutting, &c.
the jury may
acquit of the
felony, and
convict of
unlawfully
cutting, &c.

Persons wilfully
placing wood,
&c. on railways,
taking up rails,
&c. turning
machinery, or
showing signals,
&c. with intent
to commit
injuries to
railway or
endanger the
safety of persons,
guilty of felony.

If any person
shall cast wood,
&c. upon any
railway carriage
with intent to
endanger the
safety of any
person therein,

administer, to any other person any chloroform, laudanum, or other stu-
pifying or overpowering drug, matter, or thing, with intent thereby to
enable such offender or any other person to commit, or with intent to
assist such offender or other person in committing, any felony, every such
offender shall be guilty of felony, and being convicted thereof shall be
liable, at the discretion of the court, to be transported for life or for any
term not less than seven years, or to be imprisoned, with or without hard
labour, for any term not exceeding three years.

IV. And whereas it is expedient to make further provision for the
punishment of aggravated assaults: be it enacted, that if any person
shall unlawfully and maliciously inflict upon any other person, either with
or without any weapon or instrument, any grievous bodily harm, or
unlawfully or maliciously cut, stab, or wound any other person, every
such offender shall be guilty of a misdemeanor, and being convicted thereof
shall be liable, at the discretion of the court, to be imprisoned, with or
without hard labour, for any term not exceeding three years: provided
however, that nothing herein contained shall be deemed or taken to
repeal the provisions of the twenty-ninth section of the act passed in the
tenth year of the reign of his late Majesty King George the Fourth,
chapter thirty-four.

V. If upon the trial of any indictment for any felony, except murder
or manslaughter, where the indictment shall allege that the defendant did
cut, stab, or wound any person, the jury shall be satisfied that the
defendant is guilty of the cutting, stabbing, or wounding charged in such
indictment, but are not satisfied that the defendant is guilty of the felony
charged in such indictment, then and in every such case the jury may
acquit the defendant of such felony, and find him guilty of unlawfully
cutting, stabbing, or wounding, and thereupon such defendant shall be
liable to be punished in the same manner as if he had been convicted upon
an indictment for the misdemeanor of cutting, stabbing, or wounding.

VI. If any person shall wilfully and maliciously put, place, cast, or
throw upon or across any railway any wood, stone, or other matter or
thing, or shall wilfully and maliciously take up, remove, or displace any
rail, sleeper, or other matter or thing belonging to any railway, or shall
wilfully and maliciously turn, move, or divert any points or other
machinery belonging to any railway, or shall wilfully and maliciously
make or show, hide or remove, any signal or light upon or near to any
railway, or shall wilfully and maliciously do or cause to be done any
other matter or thing, with intent, in any of the cases aforesaid, to
obstruct, upset, overthrow, injure, or destroy any engine, tender,
carriage, or truck using such railway, or to endanger the safety of any
person travelling or being upon such railway, every such offender shall
be guilty of felony, and being convicted thereof shall be liable, at the
discretion of the court, to be transported beyond the seas for the term
of his natural life or for any term not less than seven years, or to be
imprisoned, with or without hard labour, for any term not exceeding
three years.

VII. If any person shall wilfully and maliciously cast, throw, or cause
to fall or strike against, into, or upon any engine, tender, carriage, or
truck used upon any railway, any wood, stone, or other matter or thing,
with intent to endanger the safety of any person being in or upon such
engine, tender, carriage, or truck, every such offender shall be guilty of
felony, and being convicted thereof shall be liable, at the discretion of the
court, to be transported beyond the seas for the term of his natural life

or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years. 14 & 15 Vict. c. 19.

VIII. If any person shall wilfully and maliciously set fire to any station, engine house, warehouse, or other building belonging or appertaining to any railway, dock, canal, or other navigation, every such person shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years; and if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other Act of Parliament, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding ten years nor less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years. *Prevention of Offences Act.*

such person to be guilty of felony, &c.
Any person wilfully setting fire to any railway station, &c. guilty of felony.

IX. And whereas provision is made in a certain act of Parliament passed in the twelfth year of the reign of Her present Majesty Queen Victoria, intituled *An Act to amend the Laws in England and Ireland relative to Larceny and other Offences connected therewith*, and also in this act, for the more exemplary punishment of persons who shall commit certain offences after one or more previous conviction or convictions for the like or other offences, and it is expedient to define the time of charging the jury to inquire as to such previous conviction or convictions: be it enacted, that it shall not be lawful on the trial of any person for any subsequent offence, where a plea of not guilty shall have been entered on his behalf, to charge the jury to inquire concerning any previous conviction until they shall have inquired concerning such subsequent offence and shall have found such person guilty of the same; and whenever in any indictment any previous conviction shall be stated the reading of such statement shall be deferred until after such finding as aforesaid: provided, that if upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence. Upon the trial of persons for subsequent offences under the 12 & 13 Vict. c. 11, and this act the previous conviction not to be stated to the jury or given in evidence until after a verdict of guilty of the subsequent offence, unless the defendant gives evidence of a good character.

X. It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any offence against the provisions of this act, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law. Any person may apprehend persons committing offences against this act, and convey them before a justice.

XI. And whereas doubts have been entertained as to the authority to apprehend persons found committing indictable offences in the night: for remedy thereof be it enacted, that it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law. Any person may apprehend persons committing indictable offences in the night, and convey them before a justice.

XII. If any person liable to be apprehended under the provisions of this act shall assault or offer any violence to any person by law autho- Any person assaulting a person entitled

14 & 15 Vict.
c. 19.

*Prevention of
Offences Act.*

to apprehend
him to be
guilty of a
misdemeanor.

The night, in
offences against
this act, to be
as in burglary.

Costs of
prosecutions.

Nothing in this
act to repeal
5 Geo. 4, c. 83.

Not to extend
to Scotland.

rized to apprehend or detain him, or to any person acting in his aid and assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, for any term not exceeding three years.

XIII. The time at which the night shall commence and conclude in any offence against the provisions of this act shall be the same as in cases of burglary.

XIV. In all prosecutions for any offence against the provisions of this act, it shall be lawful for the court before which any such offence shall be prosecuted or tried to allow the expenses of the prosecution in all respects as in cases of felony.

XV. Nothing in this act contained shall be deemed to repeal wholly or in part the fifth of George the Fourth, chapter eighty-three, intituled *An Act for the punishment of idle and disorderly persons and rogues and vagabonds, in that part of Great Britain called England*, but no person shall be liable to be punished for the same offence both under the said last-mentioned act and under this act.

XVI. Nothing in this act shall extend to Scotland.

SALE OF ARSENIC REGULATION ACT.

14 VICT. CAP. 13.

An Act to regulate the Sale of Arsenic.—[5th June, 1851.]

WHEREAS the unrestricted sale of arsenic facilitates the commission of crime: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

On every sale of
arsenic, particu-
lars of sale to be
entered in a
book by the
seller in form
set forth in
schedule to this
act.

I. Every person who shall sell any arsenic shall forthwith, and before the delivery of such arsenic to the purchaser, enter or cause to be entered in a fair and regular manner, in a book or books to be kept by such person for that purpose, in the form set forth in the schedule to this act, or to the like effect, a statement of such sale, with the quantity of arsenic so sold, and the purpose for which such arsenic is required or stated to be required, and the day of the month and year of the sale, and the name, place of abode, and condition or occupation of the purchaser, into all which circumstances the person selling such arsenic is hereby required and authorized to inquire of the purchaser before the delivery to such purchaser of the arsenic sold, and such entries shall in every case be signed by the person making the same, and shall also be signed by the purchaser, unless such purchaser profess to be unable to write (in which case the person making the entries hereby required shall add to the particulars to be entered in relation to such sale the words "cannot write"), and, where a witness is hereby required to the sale, shall also be signed by such witness, together with his place of abode.

II. No person shall sell arsenic to any person who is unknown to the person selling such arsenic, unless the sale be made in the presence of a witness who is known to the person selling the arsenic, and to whom the purchaser is known, and who signs his name, together with his place of abode, to such entries, before the delivery of the arsenic to the purchaser, and no person shall sell arsenic to any person other than a person of full age. 14 Vict. c. 13.
Sale of Arsenic Regulation Act.
Restrictions as to sale of arsenic.

III. No person shall sell any arsenic unless the same be before the sale thereof mixed with soot or indigo in the proportion of one ounce of soot or half an ounce of indigo at the least to one pound of the arsenic, and so in proportion for any greater or less quantity : provided always, that where such arsenic is stated by the purchaser to be required, not for use in agriculture, but for some other purpose for which such admixture would, according to the representation of the purchaser, render it unfit, such arsenic may be sold without such admixture in a quantity of not less than ten pounds at any one time. Provision for colouring arsenic.

IV. If any person shall sell any arsenic, save as authorized by this act, or on any sale of arsenic shall deliver the same without having made and signed the entries hereby required on such sale, or without having obtained such signature or signatures to such entries as required by this act, or if any person purchasing any arsenic shall give false information to the person selling the same in relation to the particulars which such last-mentioned person is hereby authorized to inquire into of such purchaser, or if any person shall sign his name as aforesaid as a witness to a sale of arsenic to a person unknown to the person so signing as witness, every person so offending shall for every such offence, upon a summary conviction for the same before two justices of the peace in England or Ireland, or before two justices of the peace or the sheriff in Scotland, be liable to a penalty not exceeding twenty pounds. Penalty for offending against this act.

V. Provided, that this act shall not extend to the sale of arsenic when the same forms part of the ingredients of any medicine required to be made up or compounded according to the prescription of a legally qualified medical practitioner, or a member of the medical profession, or to the sale of arsenic by wholesale to retail dealers, upon orders in writing in the ordinary course of wholesale dealing. Act not to prevent sale of arsenic in medicine under a medical prescription.

VI. In the construction of this act the word "arsenic" shall include arsenious acid and the arsenites, arsenic acid and the arseniates, and all other colourless poisonous preparations of arsenic. "Arsenic" to include arsenious compounds.

The SCHEDULE.

Day of Sale.	Name and Surname of Purchaser.	Purchaser's Place of Abode.		Condition or Occupation.	Quantity of Arsenic sold.	Purpose for which required.
1 September, 1851.	John Thomas.	Hendon	Elm Farm.	Farm Labourer.	5lbs.	To steep Wheat.

(Purchaser's Signature)
John Thomas.

Witness,
James Stone,

(Seller's Signature.)
George Wood.

Or, if Purchaser cannot write, Seller to put here the Words, "cannot write."

Grove Farm, Hendon.

EXPENSES OF PROSECUTIONS ACT.

14 & 15 VICT. CAP. 55.

An Act to amend the Law relating to the Expenses of Prosecutions, and to make further Provision for the Apprehension and Trial of Offenders in certain Cases.—[1st August, 1851.]

7 Geo. 4, c. 64.

WHEREAS by the act of the seventh year of King George the Fourth, chapter sixty-four, certain provisions were made relating to the allowance of costs, expenses, and compensations to prosecutors and witnesses in cases of prosecutions for felonies and certain misdemeanors therein mentioned, and the regulation and ascertaining of such costs and expenses, and relating to the allowance of compensation to persons who may have been active in the apprehension of offenders or persons charged with offences; and provisions have been made by other acts relating to costs, expenses, and compensations in cases of prosecutions in respect of the offences therein mentioned: and whereas it is expedient to amend the law relating to costs, expenses, and compensations in cases of criminal prosecutions: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that—

So much of
7 Geo. 4, c. 64,
s. 23, as to
expenses of
attendance
before
examining
magistrate, &c.,
repealed.

Power of courts
to allow
expenses in
prosecutions for
certain misde-
meanors
extended to
other misde-
meanors.

Parties bound
by recognizance
to prosecute or
give evidence on
bills of indict-

I. So much of section twenty-three of the said act of the seventh year of King George the Fourth as provides that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate, shall be repealed.

II. All the provisions of the said act of the seventh year of King George the Fourth, as amended by this act, authorizing and empowering courts to order payment of costs and expenses, and compensation for trouble and loss of time, in cases of the several misdemeanors enumerated in section twenty-three of the said act of King George the Fourth, and concerning orders for payment of such costs, expenses, and compensation, and the payment thereof, and all the provisions of any other act for, concerning, or applicable to the payment of such costs, expenses, and compensation in cases of the said misdemeanors, shall extend and be applicable in the case of any of the misdemeanors hereinafter mentioned; namely, unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years; unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; conspiring to charge any person with any felony, or to indict any person of any felony; conspiring to commit any felony.

III. And whereas by an act of the ninth year of King George the Fourth, chapter thirty-one, it is enacted, that where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and

determine such offence ; and it is by the said act provided, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is from any other circumstance a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of the said act : and whereas it is expedient that courts before whom such indictments shall be tried shall have power to order payment of costs to parties so bound by recognizance to prosecute or give evidence : be it enacted, that in every case of assault so brought before such justices for summary decision in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witnesses in recognizance to prosecute and give evidence at the assizes or sessions of the peace, every such court is hereby authorized and empowered at its discretion to order payment of the costs and expenses of the prosecutor and witnesses so appearing before such court under such recognizance, together with compensation for their trouble and loss of time, in the same manner as courts are authorized and empowered to order the same in cases of felony.

14 & 15 Vict.
c. 55.

*Expenses of
Prosecutions
Act.*

ment for com-
mon assaults to
be allowed costs
as in cases of
felony.

IV. So much of the said act of the seventh year of King George the Fourth as empowers the justices of the peace of any county, riding, or division, or of any liberty, franchise, city, town, or place chargeable with costs and expenses as therein mentioned, in Quarter Sessions assembled, to establish and alter regulations as to the rate of any costs and expenses to be allowed by virtue of that act, shall be repealed : provided always, that all such regulations in force at the time of the passing of this act shall continue in force until revoked, or until regulations in relation to the matter thereof are made under the powers of this act.

So much of
7 Geo. 4, c. 64,
as empowers
quarter sessions
to make
regulations as
to costs and
expenses
repealed.

V. It shall be lawful for one of Her Majesty's principal Secretaries of State to revoke any regulations made under the provision hereinbefore repealed, and to make regulations as to the rates or scales of payment of all or any costs, expenses, and compensations to be allowed or ordered to be paid under the said act or any other act or this act to prosecutors and witnesses, and to persons attending the court in obedience to any recognizance or subpoena, in cases of criminal prosecutions, and (except as hereinafter mentioned) to persons who may have been active in or towards the apprehension of persons charged with offences, and also regulations as to the rates or scales of payment according to which certificates may be granted by the examining magistrate or magistrates in respect of the expenses of any prosecutor, or witness or witnesses for the prosecution, or other person, of attending before such magistrate or magistrates, and of any compensation for trouble and loss of time therein, in any case where any court or judge is empowered under the said act of the seventh year of King George the Fourth or any other act or this act to order payment of such expenses or compensation, and concerning the forms of such certificates and the details or particulars to be inserted therein of the expenses, trouble, and loss of time to which such certificates relate, and it shall be lawful for one of Her Majesty's principal Secretaries of State from time to time to alter any such regulations, or make new regulations in relation to any of the matters aforesaid, and such regulations for the time being shall be binding on all courts and persons whomsoever.

Secretary of
State may make
regulations as
to costs,
expenses, and
compensations,
and certificates
to be granted
by examining
magistrates.

14 & 15 Vict.
c. 55.

*Expenses of
Prosecutions
Act.*

Expenses and
compensations
to be ascertained
according to
such regulation,
and magistrates'
certificate not to
be conclusive.

Act not to
interfere with
payments in
respect of
extraordinary
courage, dili-
gence, and
exertions.

Powers given to
judges by
7 Geo. 4, c. 64,
to order pay-
ments in respect
of the apprehen-
sion of certain
offenders
extended to
courts of
sessions of the
peace.

Clerks of the
peace, &c., may
be paid by
salaries in lieu
of fees.

VI. Where any court or judge empowered under the said act of the seventh year of King George the Fourth, or under any other act or this act, in this behalf, shall order payment to any prosecutor, or witness or witnesses for the prosecution, or to any person attending the court in obedience to any recognizance or subpoena, in the case of any prosecution for felony or any misdemeanor or offence, of any costs or expenses incurred, or of any compensation for trouble or loss of time, or order payment (except as hereinafter mentioned) to any person who may appear to have been active in or towards the apprehension of any person charged with any offence of compensation for expenses, exertions, and loss of time in or towards such apprehension, the amount of such costs, expenses, or compensation shall be ascertained by the proper officer of the court according to the regulations made under this act; and where the expenses and compensation in respect of attending before any examining magistrate or magistrates are so ordered to be paid, such expenses and compensation shall also be ascertained by the proper officer of the court according to such regulations, but the amount thereof as so ascertained shall not exceed the amount mentioned in the certificate of the examining magistrate or magistrates, and, save as aforesaid, the certificate of any examining magistrate or magistrates shall not be conclusive as to the amount to be allowed for expenses of attendance before him or them, or for compensation for trouble or loss of time therein.

VII. Provided always, that nothing in this act or in any regulations under this act shall interfere with or affect the power of any court to order payment to any person who may appear to such court to have shown extraordinary courage, diligence, or exertion in or towards any such apprehension as hereinbefore mentioned of such sum as such court shall think reasonable and adjudge to be paid in respect of such extraordinary courage, diligence, or exertion.

VIII. And whereas by the said act of the seventh year of King George the Fourth any Court of Oyer and Terminer and Gaol Delivery, and other courts therein mentioned, are empowered to order compensation to be paid to persons who shall appear to the court to have been active in or towards the apprehension of any person charged with murder or with any other of the crimes therein mentioned: and whereas it is expedient to extend such power to Courts of Sessions of the Peace: be it enacted, that when any person appears to any Court of Sessions of the Peace to have been active in or towards the apprehension of any party charged with any of the offences in the said enactment mentioned which such sessions may have power to try, such Court of Sessions shall have power to order compensation to be paid to such person in the same manner as the other courts in the said enactment mentioned; provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation be made out and delivered by the proper officer of the court unto such person without fee or payment of the same.

IX. And whereas it may be expedient to authorize the payment of clerks of the peace and such other clerks as hereinafter mentioned by salaries instead of fees: be it enacted, that it shall be lawful for the justices of the peace at their General or Quarter Sessions for the several counties, ridings, divisions of counties, and liberties throughout England and Wales, notice being given at the preceding Quarter Sessions that a motion will be made for such purpose, and the council or other govern-

ing body in every borough in England and Wales, from time to time, if they see fit so to do, to recommend to one of Her Majesty's principal Secretaries of State that the clerks of the peace, the clerks of special and petty sessions, and the clerks of the justices of the peace within their several jurisdictions, or any of such clerks as aforesaid, be paid by salaries in lieu of fees and other payments, or where any such clerks are for the time being paid by salaries, by virtue of any order made under this act or otherwise, to recommend that the amounts of all or any of the salaries for the time being payable be reconsidered, or that all or any of such clerks for the time being paid by salaries be paid by fees in lieu of salary, and where payment by salary in lieu of fees or the reconsideration of the amounts of any salaries is recommended, to state the amount of salary which in the opinion of such justices, council, or governing body should in each case be paid; and every such recommendation being signed by the Chairman of the Court of General or Quarter Sessions, or the mayor or other head officer of the borough, shall be transmitted to the Secretary of State; and it shall be lawful for such Secretary of State, when any such recommendation is so made to him, by order under his hand, if he so think fit, to direct that all or any of the clerks to which such such recommendation refers be paid by salary, and to fix the amount of salary to be so paid, or vary the amount of salary for the time being payable to any such clerk, or to direct that any such clerk for the time being paid by salary be paid by fees in lieu of salary; and such Secretary of State shall cause copies of every order made under this enactment affecting any clerk of the peace, or any clerks of special sessions or petty sessions, or clerks to the justices within the district of any clerk of the peace, to be transmitted to such clerk of the peace, to be by him distributed, where occasion shall require, to such other clerks as aforesaid; and the salary for the time being payable to any such clerk under any such order shall be paid out of any county rate or rate in the nature of a county rate made in the county, riding, division, or liberty, or out of the borough fund of the borough, as the case may be, for or in which such clerk of the peace or other clerk to whom the same is payable is appointed or acts: provided always, that in fixing the amount of any salary to be paid to any clerk of the peace or other clerk appointed before the passing of this act regard shall be had to the tenure of his office and to his rights in respect thereof, but no clerk of the peace or other such clerk as aforesaid appointed after the passing of this act shall be entitled to any compensation on account of any reduction of his emolument occasioned by any order made under this enactment: provided also, that no order shall be made in pursuance of any recommendation of the council or governing body of any borough in relation to the mode of payment or the amount of salary of any such clerk other than the clerk of the peace for such borough, unless the justices of such borough at a meeting of such justices approve of such recommendation, and such approval be certified to such Secretary of State, under the hand of the chairman of such meeting.

X. Provided that any such court of sessions, or council, or governing body may, where they see fit, recommend that any description (to be specified in the recommendation) of the business of any clerk whom they may recommend to be paid by salary should not be included in fixing the amount of such salary, but that such clerk should be remunerated for the same by such fees or other payments as may be payable to him in respect thereof; and where any order is made by the Secretary of State

14 & 15 Vict.
c. 55.

—
*Expenses of
Prosecutions
Act.*
—

Certain business
may be excepted
in fixing the
salaries.

14 & 15 Vict.
c. 55.

*Expenses of
Prosecutions
Act.*

Clerks paid by
salaries to
account for fees.

Fees may be
remitted by
justices.

So much of
4 & 5 Will. 4,
c. 36, as
restrains
justices of
London, &c.,
from trying
certain offences,
&c., repealed.

Such repeal not
to give power to
try offences
restrained from
being tried
under 5 & 6
Vict. c. 38.

Deputy to
assistant judge
of the Middlesex
Session need
not be in the
commission of
the peace.

in pursuance of such recommendation as last aforesaid, such clerk shall be entitled to receive, for his own use, the like fees or payments in respect of the business in such recommendation specified in this behalf as he would be so entitled to receive if not paid by salary; and, save as aforesaid, where any clerk is paid by salary under any order made by virtue of this act, such salary shall include and be deemed the remuneration for all business which such clerk may, by reason of his office, be called on to perform; and no other payment shall be made for any such business, or for or to a deputy of any such clerk.

XI. Save as hereinbefore provided, all the fees which any such clerk as aforesaid would have been for the time being entitled to receive to his own use if such order had not been made shall, so long as any order for payment of such clerk by salary in lieu of fees is in force, be by him received and paid in any county, riding, division, or liberty to the treasurer in aid of the county rate or rate in the nature of a county rate of such county, riding, division, or liberty, and in any borough to the treasurer in aid of the borough fund, and such fees shall be accounted for from time to time in such manner and under such regulations as the justices at quarter sessions, or in any borough the council or other governing body, may direct.

XII. Where any clerk is paid by salary by virtue of any order made under this act, any justices or justice before whom any proceeding is had, whereon a fee is payable which should be accounted for by such clerk under this act, or before whom any person is summoned for non-payment of any such fee, may remit such fee in whole or in part for poverty or other reasonable cause, in their or his discretion, and in every such case the justices or justice by whom any fee is wholly or in part remitted shall cause an entry to be made, in a book or books to be kept for that purpose by such clerk, of the nature and amount of the several fees so remitted, and of the reason for the remission in such case, which entry shall be signed by the justice, or two or more of the justices authorizing such remission, and shall be a sufficient voucher to discharge the clerk therefrom.

XIII. And whereas by the act of the session holden in the fourth and fifth years of King William the Fourth, chapter thirty-six, it was enacted, that the justices of the peace acting in and for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, should not, at their respective General or Quarter Sessions of the Peace, or any adjournment thereof, try any person or persons charged with any of the offences therein mentioned committed or alleged to be committed within the limits of that act: be it enacted, that the said recited enactment shall be repealed: provided always, that such repeal shall not be construed to give authority to the said justices of the peace to try any person or persons for any offence which the justices of the peace acting in and for any county, riding, division, or liberty are restrained from trying under the act of the session holden in the fifth and sixth years of Her Majesty, chapter thirty-eight.

XIV. So much of the act of the session holden in the seventh and eighth year of Her Majesty as requires that any person to be appointed a deputy to the assistant judge of the Court of the Sessions of the Peace for the county of Middlesex should be in the commission of the peace for the said county, and qualified by law to act as a justice of the peace, shall be repealed, but any person, being a serjeant or barrister-at-law of not

less than ten years standing, may, in the cases and with the allowance and in the manner therein mentioned, be appointed such deputy. 14 & 15 Vict. c. 55.

XV. The Court of Quarter or General Sessions or Adjourned Session of the Peace for the county of Middlesex shall possess the same powers for dividing such Court of Quarter or General or Adjourned Sessions as are now possessed by the Courts of Quarter and General and Adjourned Sessions of the Peace in counties in which there is an order in force for the appointment of a permanent chairman and deputy chairman; and whensoever such court shall exercise such power the assistant judge shall appoint a person qualified to act as deputy assistant judge to preside as chairman with the justices who shall be appointed to sit apart: provided always, that the name of the person who shall be so appointed shall at some previous time have been transmitted to and approved of by one of Her Majesty's principal Secretaries of State as a fit and proper person to be from time to time appointed as such deputy assistant judge.

Expenses of Prosecutions Act.

As to power of Court of Quarter or General Sessions for Middlesex for dividing such sessions.

When power exercised the assistant judge to appoint a deputy to preside as chairman with the justices appointed to sit apart.

XVI. The presence of one of the justices so as aforesaid set apart shall not be essential to the formation of the court in which such deputy assistant judge shall preside, but the jurisdiction of such justices shall not be in any way lessened by such appointment.

Presence of one of the justices so set apart not essential to formation of court.

XVII. So much of an act of the ninth year of King George the Fourth, chapter forty-three, and of an act of the session holden in the sixth and seventh years of King William the Fourth, chapter twelve, as enacts that nothing therein contained shall extend to the county of Middlesex, shall be repealed, and the said acts shall be construed and take effect as if the county of Middlesex had not been excepted from the operation thereof.

So much of 9 Geo. 4, c. 43, and 6 & 7 Will. 4, c. 12, as exempts Middlesex repealed.

XVIII. And whereas by section thirteen of the act of the session holden in the eleventh and twelfth years of Her Majesty, chapter forty-two, provision is made for indorsing such warrants as therein mentioned by any officer within any of the isles of Guernsey, Jersey, Alderney, and Sark, who shall have jurisdiction to issue any warrant or process in the nature of a warrant for the apprehension of offenders, and other provisions are made in the same act, and in the act of the same year of Her Majesty, chapter forty-three, by reference to the enactment of the said section, and doubts have arisen by whom warrants should be indorsed in the said isles pursuant to the said provisions: be it enacted, that the bailiffs of Jersey and Guernsey respectively, or in their respective absence the lieutenant bailiffs of such islands respectively, within their respective bailiwicks or jurisdictions, the judge of Alderney, or in his absence any jurat of such island within such island, and the seneschal of Sark, or in his absence his deputy within such island, shall have all such power and authority to indorse warrants as by the said acts respectively is given or expressed or intended to be given to any officer within any of such isles having jurisdiction to issue any warrant or process in the nature of a warrant for the apprehension of offenders, and for such purpose shall have authority to administer an oath, and all the provisions of the said acts shall be construed as if the officers authorized to indorse warrants by this enactment had been so authorized by the said section of the first-mentioned act of the eleventh and twelfth years of Her Majesty.

11 & 12 Vict. cc. 42 and 43.

By whom warrants to be backed in the Channel Islands.

XIX. Whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate within which Her Majesty has not been pleased for five years next before the passing of this act to direct a Commission of Oyer and Terminer and Gaol Delivery in certain counties of cities and towns

14 & 15 Vict.
c. 55.

*Expenses of
Prosecutions
Act.*

prisoners may
be committed
and tried at
assizes held for
adjoining
county.

Justices to
declare when
gaols or houses
of correction are
fit prisons for
persons com-
mitted for trial.

to be executed, and until Her Majesty shall be pleased to direct a Commission of Oyer and Terminer and Gaol Delivery to be executed within the same, shall commit for safe custody to the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the Court of Quarter Sessions of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this act, and the recognizances to appear to prosecute and give evidence taken by such justice, justices, or coroner shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the Court of Oyer and Terminer and Gaol Delivery for the next adjoining county; and whenever any such person shall be so committed, the keeper of such gaol or house of correction shall deliver to the judges of assize for such next adjoining county a calendar of all prisoners in his custody so committed, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of such adjoining county; and the justice, justices, or coroner by whom persons charged as aforesaid may be committed, shall deliver or cause to be delivered to the proper officer of the court the several examinations, informations, evidence, recognizances, and inquisitions relative to such persons at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice or justices, or coroner, having authority so to commit, and the same proceedings shall and may be had thereupon at the Sessions of Oyer and Terminer or General Gaol Delivery for such adjoining county as in the case of persons charged with offences of the like nature committed within such county.

XX. It shall be lawful for the justices of the peace, at their General or Quarter Sessions for any county, riding, or division, by order made for that purpose, to declare that any gaol or house of correction for such county, riding, or division, is a fit prison for persons committed for trial at the assizes for such county, or for the county of such riding or division; and every such order shall be signed by the chairman of such sessions, and transmitted to one of Her Majesty's principal Secretaries of State; and in case such Secretary of State see fit to approve such order, then, after the approval thereof under the hand of such Secretary of State, it shall be lawful for any justice or justices of the peace, or coroner, acting for such county, riding, or division, to commit for safe custody for trial at the next assizes, to such gaol or house of correction, any person charged with any offence triable at the assizes for such county, or for the county of such riding or division; and the commitment shall specify that such person is committed under the authority of this act; and the recognizances to appear to prosecute and give evidence taken by such justice, justices, or coroner shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the Court of Oyer and Terminer and Gaol Delivery for the county; and the keeper of such gaol or house of correction shall deliver to the judges of assize a calendar of all prisoners in custody for trial at such assizes, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of such county; and the justice, justices, or coroner by whom persons charged as aforesaid may be committed shall deliver or cause to be delivered to the proper officer of the Court of Assize the several examinations, informations, evidence, recognizances, and inquisitions relative to such per-

sons, at the time and in the manner that would be required in case such persons had been committed for trial as aforesaid to such common gaol, and the same proceedings shall and may be had thereupon at the Sessions of Oyer and Terminer or General Gaol Delivery for such county as in the case of persons so committed to such common gaol.

14 & 15 Vict.
c. 55.

Expenses of
Prosecutions
Act.

XXI. All persons who may under the authority of this act be committed to the gaol or house of correction of any county of a city or county of a town corporate for trial at the assizes to be holden for the next adjoining county, or to any gaol (other than the common gaol of the county) or house of correction for any county, riding, or division for trial at the assizes for such county, or for the county of such riding or division, shall in due time, without writ of *habeas corpus* or other writ for that purpose, be removed by the gaoler or keeper of such gaol or house of correction, with their commitments and detainers, to the common gaol of such county, in order that they may be tried at the assizes to be holden for such county, and such removal shall not be deemed or taken to be an escape.

Prisoners so
committed to
be removed to
county gaol
previous to trial.

XXII. Every prisoner so removed shall, for and during the time of such removal, and for and during the time of his being removed back to the gaol or house of correction from which he may have been brought, when and as often as he shall for any reason be so removed back, and also for and during such time as he may be detained in the county gaol, and until he shall be delivered by due course of law, be to all intents and purposes deemed and considered to be in the proper legal custody, notwithstanding he may in effecting such removal have been taken or detained out of the jurisdiction of the county of a city or town, or out of the jurisdiction of the county, riding, or division, to the gaol or house of correction of which he may have been originally committed, into any other jurisdiction, or out of the county to the common gaol of which he is removed into or through any other county or division of a county; and no action or other proceeding shall or may be maintained by such prisoner, or by any other person, against the gaoler or keeper of the gaol or house of correction from which such prisoner is removed, or against the gaoler or keeper of the common gaol of the county, by reason or in consequence of such prisoner having been taken out of the jurisdiction of such county of a city or town, county, riding, or division, from the gaol or house of correction of which such prisoner is removed, into any other jurisdiction, or out of such county to the common gaol of which he is removed into or through any other county or division of a county.

Prisoners while
under removal
to be deemed in
proper legal
custody.

XXIII. All the provisions of the act of the fifty-first year of King George the Third, chapter one hundred, applicable to convictions in pursuance of the provisions of the act of the thirty-eighth year of King George the Third, chapter fifty-two, and to the execution of the sentences passed upon any convicts on such convictions, and all the provisions of the said acts respectively concerning the payment of expenses, shall be applicable in all cases of persons who may be tried in or removed for trial to any adjoining county in pursuance of the provisions of this act, in like manner as in cases of persons tried in or removed for trial to any adjoining county in pursuance of the provisions of the said act of the thirty-eighth year of King George the Third.

The provisions
of 38 Geo. 3,
c. 52, and
51 Geo. 3,
c. 100, as to
execution of
sentences, and
as to costs,
extended to this
act.

XXIV. For the purposes of this act the counties named in the second column of schedule (C.) to the act of the session holden in the fifth and sixth years of King William the Fourth, chapter seventy-six, shall be

What to be
deemed the next
adjoining
county.

14 & 15 Vict. considered next adjoining the counties of cities and towns corporate in
c. 55. the first column of the same schedule in conjunction with which they are
respectively named.

*Expenses of
Prosecutions
Act.*

Extent of act.

XXV. This act shall not extend to Ireland or to Scotland.

ECCLESIASTICAL TITLES ASSUMPTION ACT.

14 & 15 VICT. CAP. 60.

*An Act to prevent the Assumption of certain Ecclesiastical Titles in respect of
Places in the United Kingdom.*—[1st August, 1851.]

10 Geo. 4, c. 7,
s. 24

WHEREAS divers of Her Majesty's Roman Catholic subjects have assumed to themselves the titles of archbishop and bishops of a pretended province, and of pretended sees or dioceses, within the United Kingdom, under colour of an alleged authority given to them for that purpose by certain briefs, rescripts, or letters apostolical from the see of Rome, and particularly by a certain brief, rescript, or letters apostolical purporting to have been given at Rome on the twenty-ninth of September one thousand eight hundred and fifty: and whereas by the act of the tenth year of King George the Fourth, chapter seven, after reciting that the Protestant Episcopal Church of England and Ireland, and the doctrine, discipline, and government thereof, and likewise the Protestant Presbyterian Church of Scotland, and the doctrine, discipline, and government thereof, were by the respective acts of Union of England and Scotland, and of Great Britain and Ireland, established permanently and inviolably, and that the right and title of archbishops to their respective provinces, of bishops to their sees, and of deans to their deaneries, as well in England as in Ireland, had been settled and established by law, it was enacted, that if any person after the commencement of that act other than the person thereunto authorized by law, should assume or use the name, style, or title of archbishop of any province, bishop of any bishopric, or dean of any deanery, in England or Ireland, he should for every such offence forfeit and pay the sum of one hundred pounds: and whereas it may be doubted whether the recited enactment extends to the assumption of the title of archbishop or bishop of a pretended province or diocese, or archbishop or bishop of a city, place, or territory, or dean of any pretended deanery in England or Ireland, not being the see, province, or diocese of any archbishop or bishop or deanery of any dean recognised by law; but the attempt to establish, under colour of authority from the See of Rome or otherwise, such pretended sees, provinces, dioceses, or deaneries, is illegal and void: and whereas it is expedient to prohibit the assumption of such titles in respect of any places within the United Kingdom: be it therefore declared and enacted by the Queen's most excellent Majesty, by and

with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that—

I. All such briefs, rescripts, or letters apostolical, and all and every the jurisdiction, authority, pre-eminence, or title conferred or pretended to be conferred thereby, are and shall be and be deemed unlawful and void.

*Ecclesiastical
Titles
Assumption
Act.*

II. And be it enacted, that if, after the passing of this act, any person shall obtain or cause to be procured from the bishop or see of Rome, or shall publish or put in use within any part of the United Kingdom, any such bull, brief, rescript, or letters apostolical, or any other instrument or writing, for the purpose of constituting such archbishops or bishops of such pretended provinces, sees, or dioceses within the United Kingdom, or if any person, other than a person thereunto authorized by law in respect of an archbishopric, bishopric, or deanery of the United Church of England and Ireland, assume or use the name, style, or title of archbishop, bishop, or dean of any city, town, or place, or of any territory or district, (under any designation or description whatsoever), in the United Kingdom, whether such city, town, or place, or such territory or district be or be not the see or the province, or co-extensive with the province, of any archbishop, or the see or the diocese, or co-extensive with the diocese, of any bishop, or the seat or place of the church of any dean, or co-extensive with any deanery, of the said United Church, the person so offending shall for every such offence forfeit and pay the sum of one hundred pounds, to be recovered as penalties imposed by the recited act may be recovered under the provisions thereof, or by action of debt at the suit of any person in one of Her Majesty's Superior Courts of Law, with the consent of Her Majesty's Attorney-General in England and Ireland, or Her Majesty's Advocate in Scotland, as the case may be.

Briefs, rescripts, or letters apostolical declared unlawful and void.

Persons procuring, publishing, or putting in use any such brief, &c., for constituting archbishops, bishops, &c., of pretended provinces, sees, or dioceses, liable to a penalty of 100*l.* for every offence.

Recovery of penalties.

III. This act shall not extend or apply to the assumption or use by any bishop of the Protestant Episcopal Church in Scotland exercising episcopal functions within some district or place in Scotland of any name, style, or title in respect of such district or place; but nothing herein contained shall be taken to give any right to any such bishop to assume or use any name, style, or title which he is not now by law entitled to assume or use.

Act not to extend to bishops of the Protestant Episcopal Church in Scotland.

IV. Be it enacted, that nothing herein contained shall be construed to annul, repeal, or in any manner affect any provision contained in an act passed in the eighth year of the reign of Her present Majesty, intituled *An Act for the more effectual Application of Charitable Donations and Bequests in Ireland.*

Nothing to affect provisions of 7 & 8 Vict. c. 97.

LAW OF EVIDENCE AMENDMENT ACT.

14 & 15 VICT. CAP. 99.

An Act to Amend the Law of Evidence.—[7th August, 1851.]

WHEREAS it is expedient to amend the Law of Evidence in divers particulars: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Recited proviso
in s. 1 of 6 & 7
Vict. c. 85,
repealed.

I. So much of section one of the act of the sixth and seventh years of Her present Majesty, chapter eighty-five, as provides that the said act shall "not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part," is hereby repealed.

Parties to be
admissible
witnesses.

II. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vitâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

Nothing herein
to compel person
charged with
criminal offence
to give evidence
tending to
criminate
himself, &c.

III. But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

Not to apply to
proceedings in
consequence of
adultery, &c.

IV. Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either House of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage.

Nothing to
repeal any
provisions of
7 Will. 4 &
1 Vict. c. 26.

V. Nothing herein contained shall repeal any provision contained in chapter twenty-six of the statute passed in the session of Parliament holden in the seventh year of the reign of King William the Fourth and the first year of the reign of Her present Majesty.

Common law
courts autho-

VI. Whenever any action or other legal proceeding shall henceforth be pending in any of the Superior Courts of Common Law at West-

minster or Dublin, or the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county of Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a Court of Equity at the instance of the party so making application as aforesaid to the said court or judge.

14 & 15 Vict.
c. 99.

*Law of
Evidence
Amendment
Act.*

—
rized to compel
inspection of
documents
whenever
Equity would
grant discovery.

VII. All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

Foreign and
colonial acts of
state, judgments,
&c.,
provable by
certified copies,
without proof of
seal or signature
or judicial
character of
person signing
the same.

VIII. Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the Society of the Art and Mystery of Apothecaries of the City of London shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

Apothecaries'
certificates
admissible
without proof of
seal.

IX. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal or stamp

Documents
admissible
without proof of
seal, &c., in

14 & 15 Vict.
c. 99.

*Law of
Evidence
Amendment
Act.*

England or
Wales

equally ad-
missible in
Ireland.

Documents
admissible
without proof
of seal, &c., in
Ireland equally
admissible in
England and
Wales.

Documents
admissible
without proof
of seal, &c., in
England, Wales,
or Ireland
equally ad-
missible in the
colonies.

Registers of
British vessels
and certificates
of registry
admissible as
prima facie
evidence of their
contents,
without proof of
signature, &c.

Where necessary
to prove
conviction or
acquittal of
person charged,
not necessary to
produce record,

or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

X. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

XI. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any of such colonies by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

XII. Every register of a vessel kept under any of the acts relating to the registry of British vessels may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of one shilling; and every such register or such copy of a register, and also every certificate of registry, granted under any of the acts relating to the registry of British vessels, and purporting to be signed as required by law, shall be received in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, as *prima facie* proof of all the matters contained or recited in such register when the register or such copy thereof as aforesaid is produced, and of all the matters contained or recited in or endorsed on such certificate of registry when the said certificate is produced.

XIII. And whereas it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings: be it enacted, that whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall

be sufficient that it be certified or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

14 & 15 Vict.
c. 99.

*Law of
Evidence
Amendment
Act.*

XIV. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

but may be
certified under
hand of clerk of
court.

Examined or
certified copies
of documents
admissible in
evidence.

XV. If any officer authorized or required by this act to furnish any certified copies or extracts shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months.

Certifying a
false document
a misdemeanor.

XVI. Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.

Court, &c., may
administer
oaths.

XVII. If any person shall forge the seal, stamp, or signature of any document in this act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall, upon conviction, be liable to transportation for seven years, or to imprisonment for any term not exceeding three years nor less than one year, with hard labour: and whenever any such document shall have been admitted in evidence by virtue of this act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions as to the said court or person shall seem meet: and every person who shall be charged with committing any felony under this act, or under the act of the eighth and ninth years of Her present Majesty, chapter one hundred and thirteen, may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he shall be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried.

Persons forging
seal, stamp, or
signature of
certain docu-
ments, or
wilfully uttering
same, guilty of
felony.

Act not to
extend to
Scotland.

XVIII. This act shall not extend to Scotland.

14 & 15 Vict.
c. 99.

*Law of
Evidence
Amendment
Act.*

Interpretation
of "British
colony."
Commencement
of act.

XIX. The words "British colony" as used in this act shall apply to all the British territories under the government of the East India Company, and to the islands of Guernsey, Jersey, Alderney, Sark, and Man, and to all other possessions of the British Crown, wheresoever and whatsoever.

XX. This act shall come into operation on the first day of November in the present year.

ADMINISTRATION OF CRIMINAL JUSTICE IMPROVEMENT ACT.

14 & 15 VICT. CAP. 100.

An Act for further improving the Administration of Criminal Justice.—[7th August, 1851.]

WHEREAS offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: and whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence: and whereas a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The court may amend certain variances not material to the merits of the case, and by which the defendant cannot be prejudiced in his defence, and may either proceed with or postpone the trial to be had before the same or another jury.

I. From and after the coming of this act into operation, whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing what-

soever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius the order for the amendment shall be endorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be endorsed on the indictment or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: provided that in all such cases where the trial shall be so postponed as aforesaid it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: provided also, that where any such trial shall be to be had before another jury the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.

II. Every verdict and judgment which shall be given after the making of any amendment under the provisions of this act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.

III. If it shall become necessary at any time for any purpose whatsoever to draw up a formal record in any case where any amendment shall have been made under the provisions of this act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.

IV. In any indictment for murder or manslaughter preferred after the coming of this act into operation it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased.

V. In any indictment for forging, uttering, stealing, embezzling,
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14 & 15 Vict.
c. 100.

*Administration
of Criminal
Justice
Improvement
Act.*

Verdicts and
judgments
valid after
amendments.

Records to be
drawn up in
amended form,
without
noticing the
amendments.

The means by
which the injury
was inflicted
need not be
specified in
indictments for
murder and
manslaughter.

Forms of
indictment in

14 & 15 Vict.
c. 100.

*Administration
of Criminal
Justice
Improvement
Act.*

cases of forgery
and uttering,
stealing, and
embezzling, or
obtaining by
false pretences

In engraving
plates, &c.

In other cases.

destroying, or concealing, or for obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or facsimile thereof, or otherwise describing the same or the value thereof.

VI. In any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter or thing by any name or designation by which the same may be usually known, without setting out any copy or *fac simile* of the whole or any part of such instrument, matter, or thing.

VII. In all other cases wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac simile* of the whole or any part thereof.

Intent to
defraud par-
ticular persons
need not be
alleged or
proved in cases
of forgery,
uttering, or
false pretences.

VIII. From and after the coming of this act into operation it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and on the trial of any of the offences in this section mentioned it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud.

A party
indicted for
felony or
misdemeanor
may be found
guilty of an
attempt to
commit the
same, and shall
be liable to the
same conse-
quences as if
charged with
and convicted
of the attempt
only.

No person so
tried to be
afterwards
prosecuted for
the same.

Repeal of the
11th section of
7 Will. 4 &
1 Vict. c. 85.

IX. And whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof: for remedy thereof be it enacted, that if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.

X. And whereas it is enacted by a certain act of Parliament passed in the first year of the reign of Her present Majesty Queen Victoria, intituled *An Act to amend the Laws relating to Offences against the Person*, that "on the trial of any person for any of the offences therein-before mentioned, or for any felony whatever where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against

the person indicted, if the evidence shall warrant such finding : " and whereas great difficulties have arisen in the construction of such enactment : for remedy thereof be it enacted, that the said enactment shall be and the same is hereby repealed.

XI. If upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob ; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.

XII. If upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor ; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.

XIII. If upon the trial of any person indicted for embezzlement as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny ; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement ; and no person so tried for embezzlement or larceny as aforesaid shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts.

XIV. If upon the trial of two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part of such property.

XV. And whereas it frequently happens that the principal in a felony is not in custody or amenable to justice, although several accessaries to such felony or receivers at different times of stolen property the subject of such felony may be in custody or amenable to justice : for the preven-

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On the trial of an indictment for robbery the jury may convict of an assault with intent to rob.

No person so tried to be afterwards prosecuted for the same.

Person tried for misdemeanor not to be acquitted if the offence turn out to be felony, unless the court so direct.

Person indicted for embezzlement as a clerk, &c., not to be acquitted if the offence turn out to be larceny, and vice versa.

Upon an indictment for jointly receiving, persons guilty of separately receiving may be convicted.

Separate accessaries and receivers may

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be included in
the same
indictment in
the absence of
the principal
felon.

Three larcenies
from the same
person within
six months may
be included in
the same
indictment.

Where a single
taking is
charged, the
prosecutor not
required to elect,
unless it appear
that there were
more than three
takings, or more
than six months
between the first
and last taking.
Coin and bank
notes may be
described simply
as money.

Certain pro-
visions of
23 Geo. 2, c. 11,
and 31 Geo. 3,
(1.) extended.

Any court
judge, justice,
&c., may direct
a person guilty
of perjury in
any evidence,
&c., to be
prosecuted,

tion of several trials be it enacted, that any number of such accessories or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

XVI. It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months, from the first to the last of such acts, and to proceed thereon for all or any of them.

XVII. If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings.

XVIII. In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England or any other bank it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved, and in cases of embezzlement and obtaining money or bank notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.

XIX. Whereas by an act of Parliament passed in England in the twenty-third year of the reign of His late Majesty King George the Second, intituled *An Act to render Prosecutions for Perjury and Subornation of Perjury more easy and effectual*, and by a certain other act of Parliament made in Ireland in the thirty-first year of the reign of His late Majesty King George the Third, intituled *An Act to render Prosecutions for Perjury and Subornation of Perjury more easy and effectual, and for affirming the Jurisdiction of the Quarter Sessions in Cases of Perjury*, certain provisions were made to prevent persons guilty of perjury and subornation of perjury from escaping punishment by reason of the difficulties attending such prosecutions: and whereas it is expedient to amend and extend the same: be it enacted, that it shall and may be lawful for the judges or judge of any of the Superior Courts of Common Law or Equity, or for any of Her Majesty's Justices or Commissioners of Assize, Nisi Prius, Oyer and Terminer, or Gaol Delivery, or for any justices of the peace, recorder or deputy recorder, chairman, or other judge, holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any County Court or any Court of Record, or for any justices

of the peace in special or petty sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the Superior Courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next Session of Oyer and Terminer or Gaol Delivery for the county or other district, within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next Session of Oyer and Terminer or Gaol Delivery, and that he will then surrender and take his trial, and not depart the court without leave, and to require any person he or they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct; and when allowed by any such court in Ireland such sum as shall be so allowed shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland: provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.

XX. In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.

XXI. In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore

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and commit the party, unless he enter into recognizance to appear and take his trial, and bind persons to give evidence;

and give certificate of prosecution being directed, which shall be sufficient evidence of the same.

Extending the 23 Geo. 2, c. 11, s. 1, to other offences, and simplifying indictments for perjury and other like offences.

Extending the 23 Geo. 2, c. 11, s. 2, as to form of indictments for subornation of perjury and other like offences.

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On trials for perjury and subornation a certificate of the trial of the indictment on which the perjury was committed sufficient evidence of such trial.

Venue in the margin sufficient, except where local description is necessary.

What defects shall not vitiate an indictment.

Formal objections to indictments shall be taken before jury are sworn.

mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit; and wherever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.

XXII. A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken, shall upon the trial of any indictment for perjury or subornation of perjury be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.

XXIII. It shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue.

XXIV. No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute" instead of "against the form of the statutes," or *vice versa*, nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence.

XXV. Every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the

court or other person, and thereupon the trial shall proceed as if no such defect had appeared. 14 & 15 Vict. c. 100.

XXVI. So much of a certain act of Parliament passed in the sixtieth year of the reign of His late Majesty King George the Third, intituled *An Act to prevent Delay in the Administration of Justice in Cases of Misdemeanor*, as provides that "where any person shall be prosecuted for any misdemeanor by indictment at any Session of the Peace, Session of Oyer and Terminer, Great Session, or Session of Gaol Delivery, within that part of Great Britain called England, or in Ireland, having been committed to custody or held to bail to appear to answer for such offence twenty days at the least before the session at which such indictment shall be found, he or she shall plead to such indictment, and trial shall proceed thereupon, at such same Session of the Peace, Session of Oyer and Terminer, Great Session, or Session of Gaol Delivery respectively, unless a writ of *certiorari* for removing such indictment into His Majesty's Court of King's Bench at Westminster or in Dublin shall be delivered at such session before the jury shall be sworn for such trial," shall be and the same is hereby repealed. *Administration of Criminal Justice Improvement Act.* Court may amend any formal defect. Repealing part of 60 Geo. 3, & 1 Geo. 4, c. 4, as to the traverse of indictments in cases of misdemeanor.

XXVII. No person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any Session of the Peace, Session of Oyer and Terminer, or Session of Gaol Delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose. Provision as to traversing indictments.

XXVIII. In any plea of *autrefois* convict or *autrefois* acquit it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment. Provision as to plea of *autrefois* convict or *autrefois* acquit.

XXIX. Whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; any indecent assault, or any assault occasioning actual bodily harm; any attempt to have carnal knowledge of a girl under twelve years of age; any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment. Punishment for certain indictable misdemeanors.

XXX. In the construction of this act the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment, and also any "plea," "replication," or other pleading, and any *Nisi Prius* record; and the terms "finding of the indictment" shall be understood to include "the taking of an inquisition," "the exhibiting of an information," and "the making a present- Interpretation of terms.

- 14 & 15 Vict. c. 100. *Administration of Criminal Justice Improvement Act.* ment ;" and wherever in this act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applied to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing ; and the word "property" shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.
- Commencement of act. XXXI. This act shall come into operation on the first day of September, one thousand eight hundred and fifty-one.
- Not to extend to Scotland. XXXII. Nothing in this act shall extend to Scotland.

PRECEDENTS.

No. V.

Indictment for Perjury committed at the Central Criminal Court on the Trial of an Indictment for Wounding, with intent to Murder.

CENTRAL Criminal Court, } The jurors for our Lady the Queen,
to wit. } upon their oath present that, at a
General Session of the delivery of the Queen's gaol at Newgate, holden
for the jurisdiction of the said Central Criminal Court, at Justice Hall,
in the Old Bailey, in the suburbs of the city of London, on Monday, the
6th day of January, in the year of our Lord 1851, before John Musgrove,
Esq., Mayor of the city of London, Sir Frederick Pollock, Knight,
Chief Baron of our said Lady the Queen, of her Court of Exchequer,
Sir John Patteson, Knight, one of the Justices of our said Lady the
Queen, assigned to hold pleas before the Queen herself, Sir Thomas
Noon Talfourd, one of the Justices of our said Lady the Queen, of her
Court of Common Pleas, assigned to deliver the said gaol of Newgate
of the prisoners therein being, one G. H. and one E. H. were in due
form of law tried by a certain jury, upon a certain indictment then and
there depending against them, for having unlawfully, maliciously, and
feloniously assaulted and wounded one J. P., with intent to murder her,
within the jurisdiction of the said Central Criminal Court; and the
jurors aforesaid, upon their oath aforesaid, do further present that, at
and upon the trial aforesaid, one S. D., late of the parish of in
the county of singlewoman, did appear as a witness for and on
behalf of our said Lady the Queen, and then and there before the said
Central Criminal Court, to wit, at the said session of gaol delivery, on
the day and year aforesaid, at the parish aforesaid, was in due manner
sworn, and took her corporal oath upon the holy Gospel of God to
speak the truth as such witness as aforesaid, the said Central Criminal
Court then and there having sufficient and competent lawful power and
authority to administer the said oath to the said S. D. in that behalf.
And the jurors aforesaid, upon their oath aforesaid, do further present
that at and upon the said trial of the said G. H. and E. H. upon the said
indictment as aforesaid, it became and was a material question and
subject of inquiry whether the said S. D., at any and what time, and
whether on the 2nd day of December, A.D. 1850, and while the said
S. D. was standing at the door of any house in Rupert-street, in the
parish of Bethnal Green, in the county of Middlesex, saw any persons
struggling, and where, and how many such persons, and under what
circumstances, and who such persons and every of them were, and

Precedents.

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No. V.
Indictment for
perjury com-
mitted at the
Central
Criminal Court.

whether or not the said G. H. and E. H. and J. P., or either of them, were struggling together, and whether or not any of such persons, and which of them, wore masks, and whether or not after any struggling any and which of such persons left or went away, and whether or not before they so left, or at any other time upon the occasion of such struggling, the said S. D. saw the said J. P. upon the ground, and whether, in fact, the said J. P. was upon the ground after any such struggling, and whether, in fact, there had been any struggling between the said J. P. and the said G. H. and E. H., or either of them, and what were the particulars and circumstances attending and connected with any such struggling at the time when such struggling occurred; and the jurors aforesaid, upon their oath aforesaid, do further present that the said S. D., being so sworn as aforesaid, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and devising and wickedly intending to deceive the said Central Criminal Court in the premises, then and there before the said Central Criminal Court, at the said Session of Gaol Delivery, to wit, on the said 6th day of January, A.D. 1851, as such witness as aforesaid, upon the trial aforesaid, and whilst it was such material question and subject of inquiry as aforesaid, unlawfully, falsely, knowingly, wilfully, wickedly, corruptly, and maliciously did say, depose, swear, and give evidence to the said Central Criminal Court, amongst other things, in substance and to the effect following, that is to say, that on the said 2nd December, A.D. 1850, she, the said S. D., after leaving the said J. P. at work on the night of that day, went home to her own house in Rupert-street (meaning Rupert-street aforesaid), that she the said S. D. stood at the door of that house, and, whilst so standing there, she saw a man and two women struggling under the dead wall under the lamp nearest to the door of the said S. D.; that she the said S. D. could not swear to the said man, but that the said E. H. was one of the said women, and that the said S. D. observed masks about the persons of the said man and the said last-mentioned woman; that, after some struggling, the said man and the said E. H. left, and that before they so left, she, the said S. D., saw the said J. P. on the ground; whereas, in truth and in fact, the said S. D. did not on the said 2nd day of December, while standing at the door of any house in Rupert-street aforesaid, see a man and two women, or any person whatever, struggling under the said wall or elsewhere, as the said S. D. so said, deposed, swore, and gave in evidence as aforesaid; and whereas it was not nor is it the fact that any such man and two women, or any persons whatever, were struggling under the said wall at the said time as said, deposed, sworn to, and given in evidence by the said S. D. as aforesaid, as she the said S. D. at the time she so said, deposed, swore to, and gave evidence as aforesaid well knew; and whereas, in truth and in fact, no such man or woman as she the S. D. in that behalf said, swore to, deposed, and gave evidence, wore any masks whatever, as she the said S. D. so said, deposed to, swore, and gave evidence as aforesaid; and whereas, in truth and in fact, the said S. D. did not see the said J. P. on the ground after any struggling whatever, nor was the said J. P. so on the ground as the said S. D. so said, deposed to, swore, and gave evidence as aforesaid; and whereas, in truth and in fact, the said alleged struggling, and the said several circumstances in connexion therewith, so alleged by the said S. D. as aforesaid, had no existence whatever, but were so alleged, sworn to, and given in evidence as aforesaid, by the said S. D. for the purpose of unlawfully,

wickedly, and maliciously causing the said G. H. and the said E. H., and each of them, falsely to be convicted on the said indictment, and for no other purpose whatsoever; and so the jurors aforesaid, upon their oath aforesaid, do say that the said S. D., then and there before the said Central Criminal Court, to wit, at the said Session of Gaol Delivery, on the said first mentioned day and year aforesaid, at the parish first aforesaid, in the city of London aforesaid, and within the jurisdiction of the said Central Criminal Court, as such witness as aforesaid, upon the trial aforesaid, upon her oath aforesaid, the said Central Criminal Court then and there having lawful and competent power and authority to administer the said oath to her the said S. D. as aforesaid, by her own act and consent, and of her own most wicked and corrupt mind, in manner and form aforesaid, falsely, knowingly, wickedly, wilfully, and corruptly, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Precedents.
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No. V.
Indictment for
perjury com-
mitted at the
Central
Criminal Court

No. VI.

Indictment under the 8 & 9 Vict. c. 109, s. 17, for Cheating at Cards, with a Count for an attempt to Cheat.

CENTRAL Criminal Court, } The jurors of our Sovereign Lady
to wit. } the Queen, upon their oath present
that Thomas Brown, late of the parish of St. Botolph, Bishopsgate,
in London, and within the jurisdiction of the said Central Criminal
Court, labourer, on the 23rd day of January, in the year of our Lord
1851, at the parish aforesaid, in London aforesaid, and within the juris-
diction of the said Central Criminal Court, by fraud and unlawful ill
practice in playing at and with cards, to wit, at a certain game played
with cards called "loo," unlawfully, fraudulently, deceitfully, and design-
edly did win from a certain other person, to wit, one R. Whitehead, to
himself, the said T. B., a large sum of money, of the money of the said
R. W., to wit, the sum of 4*l.*, and so the jurors aforesaid, upon their
oath aforesaid, do say that the said T. B., on the day and year aforesaid,
at the parish aforesaid, in London aforesaid, and within the jurisdiction
of the said Central Criminal Court, unlawfully, designedly, deceitfully,
and by a false pretence, to wit, by the said fraud and unlawful ill prac-
tice, did obtain from the said R. W. the said sum of money, of the money
of him the said R. W., with intent then and there to cheat and defraud
him of the same, to the great injury and deception of the said R. W.,
in contempt of our said Lady the Queen and her laws, against the form
of the statute in such case made and provided, and against the peace of
our said Lady the Queen, her crown and dignity.

Precedents.

No. VI.
Indictment
under 8 & 9 Vict.
c. 109, s. 17,
for cheating at
cards.

Second and
third counts.

Fourth count.

The 2nd and 3rd counts were in the same form, alleging the money to have been obtained from other persons.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B., on the day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly, and deceitfully, did practice a certain fraud upon one R. W., in playing with him a certain game at cards, to wit, a certain game played with cards called "Loo," that is to say, by fraudulently, deceitfully, and contrary to the rules regulating the said game, secreting divers cards, enabling the said T. B. to become a winner at the said game, and afterwards unfairly, unjustly, and in fraud of the said R. W., making use of the said cards, in the same game, against the said R. W., at such time, and under such circumstances as enabled the said T. B. to win thereat, as cards then held by the said T. B. by chance, and not by any design, trick, or manœuvre, and thereby acquiring an unfair advantage over the said R. W. in playing the said game in this count mentioned. And the said jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B. then and there, to wit, on the day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, by the said fraud and unlawful ill practice in this count mentioned, in playing at the said last-mentioned game, unlawfully, deceitfully, and designedly did win from the said R. W. to himself, the said T. B. a large sum of money, of the money of the said R. W., to wit, the sum of 4*l*. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B. then and there, to wit, on the day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, having so won the said sum of money in this count mentioned, unlawfully, knowingly, and designedly did falsely pretend to the said R. W. that the said sum of money had been fairly won of him the said R. W. at the said game, and that all the said cards played by him the said T. B. at the said game had been held by him by chance, and not by any design, trick, manœuvre, artifice, or fraud whatsoever, by means of which said false pretences the said T. B. then and there unlawfully, knowingly, and designedly did fraudulently obtain of and from the said R. W. the said sum of money in this count mentioned, with intent then and there to cheat and defraud the said R. W. of the same, to the great injury and deception of the said R. W., in contempt of our said Lady the Queen and her laws, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Fifth and
sixth counts.

Seventh count.

The 5th and 6th counts were of a similar form.

Seventh Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B., on the said 23rd day of January, in the year of our Lord 1851, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, by fraud and unlawful ill practice in playing at and with cards, to wit, at a certain game played with cards called "loo," unlawfully, fraudulently, deceitfully, and designedly did win from a certain other person, to wit, one J. Young, to himself the said T. B., a certain sum of money of the said J. Y., that is to say, one piece of the current gold coin of this realm, called a sovereign, three pieces of the current silver coin of this realm called shillings, and three pieces of the current silver coin of this

realm called sixpences ; and so the jurors aforesaid, upon their oath aforesaid, do say that the said T. B., on the day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, designedly, and by a false pretence, to wit, by the said fraud and unlawful ill practice, did obtain from the said J. Y. the said money in this count mentioned, with intent then and there to cheat and defraud him of the same, to the great injury and deception of the said J. Y., in contempt of our said Lady the Queen and her laws, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Precedents.

No. VI.
Indictment
under 8 & 9 Vict.
c. 109, s. 17,
for cheating at
cards.

Eighth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B., on the day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly, and deceitfully did practice a certain fraud upon one J. Y., in playing with him a certain game with cards called “loo,” that is to say, by fraudulently, deceitfully, and contrary to the rules regulating the said game, secreting divers cards, enabling the said T. B. to become a winner of the said game, and afterwards unfairly, unjustly, and in fraud of the said J. Y., making use of the said cards in the said game against the said J. Y., at such time, and under such circumstances as enabled the said T. B. to win thereat, as cards then held by the said T. B. by chance, and not by any design, trick, or manœuvre, and thereby acquiring an unfair advantage over the said J. Y. in playing the said game in this count mentioned. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B., then and there, to wit, on the day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, by the said fraud and unlawful ill practice in this count mentioned, in playing at the said last-mentioned game, unlawfully, deceitfully, and designedly did win from the said J. Y. to himself the said T. B. certain money of the said J. Y., to wit, one piece of the current gold coin of this realm called a sovereign, three pieces of the current silver coin of this realm called shillings, and three pieces of the current silver coin of this realm called sixpences. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B. then and there, to wit, on the day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, having so won the said money in this count mentioned, unlawfully, knowingly, and designedly did falsely pretend to the said J. Y. that the said money in this count mentioned had been fairly won of him the said J. Y. at the said game, and that all the said cards played by him the said T. B. at the said game had been held by him by chance, and not by any design, trick, manœuvre, or artifice, or fraud whatsoever, by means of which said false pretences in this count mentioned the said T. B. then and there unlawfully, knowingly, and designedly did fraudulently obtain of and from the said J. Y. the said money in this count mentioned with intent then and there to cheat and defraud the said J. Y. of the same, to the great injury and deception of the said J. Y., in contempt of our said Lady the Queen and her laws, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Ninth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B., on the day and year aforesaid, at

Ninth count.

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Indictment
under 8 & 9 Vict
c. 109, s. 17,
for cheating at
cards.

Tenth and
eleventh counts.
Twelfth count.

Thirteenth
count.

the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, and by a false pretence, that is to say, by fraud and unlawful ill practice in playing at and with cards, unlawfully did win and obtain from one R. W. to him the said T. B., a certain large sum of money of the said R. W., to wit, the sum of 4*l.*, with intent to cheat and defraud him of the same, to the great injury and deception of the said R. W., in contempt of our said Lady the Queen and her laws, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

The 10th and 11th counts were similar in form.

Twelfth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and at the time of the committing of the offence hereinafter mentioned, the said T. B., one C. I., the said J. Y., and two other persons were playing a certain game at cards, to wit, called the game of “loo,” to wit, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B. then and there unlawfully did practice a certain fraud in playing the said game, that is to say, contrary to the rules of the said game, did secrete a certain card, to wit, the ace of clubs, for the purpose of playing such card when the same might enable the said T. B. to win thereby at the said game, and the said card, so secreted as aforesaid, then and there did offer to play as a certain card then and there held by the said T. B. by chance at the said game, and not by any unlawful practice, trick, or manœuvre, with intent then and there, and by means of the said fraud and unlawful ill practice, to win money of and from the said J. Y. And so the jurors aforesaid, upon their oath aforesaid, do say that the said T. B. unlawfully and by a false pretence, to wit, by the said fraud, and contrary to the form of the statute in such case made and provided, on the day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said court, did attempt and endeavour to obtain money of and from the said J. Y., and to cheat and defraud him of the same, to the great injury and deception of the said J. Y., in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Thirteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B., on the said 23rd day of January, in the year of our Lord 1851, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, by fraud and unlawful ill practice in playing at and with cards, to wit, at a certain game played with cards called “loo,” unlawfully, fraudulently, deceitfully, and designedly did win from a certain other person, to wit, one R. W., to himself the said T. B., a certain sum of money of the said R. W., that is to say, two pieces of the current gold coin of this realm called sovereigns, one piece of the current gold coin of this realm called a half-sovereign, two pieces of the current silver coin of this realm called crowns, four pieces of the current silver coin of this realm called half-crowns, five pieces of the current silver coin of this realm called shillings, and ten pieces of the current silver coin of this realm called sixpences. And so the jurors aforesaid, upon their oath aforesaid, do say that the said T. B. on the

day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, designedly, and by a false pretence, to wit, by the said fraud and unlawful ill practice, did obtain from the said R. W. the said money in this count mentioned, with intent then and there to cheat and defraud him of the same, to the great injury and deception of the said R. W., in contempt of our Lady the Queen and her laws, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Precedents.

No. VI.
Indictment
under 8 & 9 Vict.
c. 109, s. 17,
for cheating at
cards.

No. VII.

Indictment for obtaining Money by the False Pretence on the part of the Defendant that he was entitled to grant a Lease of certain Freehold Property.

CENTRAL Criminal Court, } The jurors for our Lady the Queen,
to wit. } upon their oath present that P. F.,
late of the parish of Saint Luke, Chelsea, in the county of Middlesex,
labourer, on the 11th day of July, A.D. 1851, at the parish aforesaid,
in the county aforesaid, and within the jurisdiction of the Central
Criminal Court, unlawfully and knowingly did falsely pretend to one
B. E. that he the said P. F. then was the freeholder of a certain
messuage and premises, situate and being in Church-street, in the
parish aforesaid, in the county aforesaid, and that he the said P. F.
then had a good and sufficient right, title, estate, and interest in the
said messuage and premises to entitle and enable him the said P. F.
to grant to the said B. E. a lease of the said messuage and premises
for a term of twenty years, and that he the said P. F. then had power
to grant the said lease to the said B. E., and to give to the said B. E.
a good and valid title to the said messuage and premises for the said
term of twenty years, by means of which said false pretences the said
P. F. did then and there unlawfully and fraudulently obtain from the
said B. E. thirty pieces of the current gold coin of this realm called
sovereigns, ten pieces of the current silver coin of this realm called
shillings, and one promissory note of the Governor and Company
of the Bank of England, for the payment of ten pounds of the moneys
of the said B. E., with intent then and there to cheat and defraud
him of the same; whereas, in truth and in fact, the said P. F. was
not at the time he so falsely pretended as aforesaid the freeholder of the
said messuage and premises, or of any part thereof, nor had he then any
freehold estate whatever in the said messuage and premises, or in any
part thereof, as he the said P. F. then well knew; and whereas, in truth
and in fact, the said P. F. had not at the time he so falsely pretended as
aforesaid a sufficient right, title, estate, or interest to entitle or enable
him to grant any lease of the said messuage and premises for a term of

Precedents.

No. VI.
Indictment
under 8 & 9 Vict
c. 109, s. 17,
for cheating at
cards.

Tenth and
eleventh counts.
Twelfth count.

the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, and by a false pretence, that is to say, by fraud and unlawful ill practice in playing at and with cards, unlawfully did win and obtain from one R. W. to him the said T. B., a certain large sum of money of the said R. W., to wit, the sum of 4*l.*, with intent to cheat and defraud him of the same, to the great injury and deception of the said R. W., in contempt of our said Lady the Queen and her laws, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

The 10th and 11th counts were similar in form.

Twelfth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and at the time of the committing of the offence hereinafter mentioned, the said T. B., one C. I., the said J. Y., and two other persons were playing a certain game at cards, to wit, called the game of “loo,” to wit, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B. then and there unlawfully did practice a certain fraud in playing the said game, that is to say, contrary to the rules of the said game, did secrete a certain card, to wit, the ace of clubs, for the purpose of playing such card when the same might enable the said T. B. to win thereby at the said game, and the said card, so secreted as aforesaid, then and there did offer to play as a certain card then and there held by the said T. B. by chance at the said game, and not by any unlawful practice, trick, or manœuvre, with intent then and there, and by means of the said fraud and unlawful ill practice, to win money of and from the said J. Y. And so the jurors aforesaid, upon their oath aforesaid, do say that the said T. B. unlawfully and by a false pretence, to wit, by the said fraud, and contrary to the form of the statute in such case made and provided, on the day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said court, did attempt and endeavour to obtain money of and from the said J. Y., and to cheat and defraud him of the same, to the great injury and deception of the said J. Y., in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Thirteenth
count.

Thirteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said T. B., on the said 23rd day of January, in the year of our Lord 1851, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, by fraud and unlawful ill practice in playing at and with cards, to wit, at a certain game played with cards called “loo,” unlawfully, fraudulently, deceitfully, and designedly did win from a certain other person, to wit, one R. W., to himself the said T. B., a certain sum of money of the said R. W., that is to say, two pieces of the current gold coin of this realm called sovereigns, one piece of the current gold coin of this realm called a half-sovereign, two pieces of the current silver coin of this realm called crowns, four pieces of the current silver coin of this realm called half-crowns, five pieces of the current silver coin of this realm called shillings, and ten pieces of the current silver coin of this realm called sixpences. And so the jurors aforesaid, upon their oath aforesaid, do say that the said T. B. on the

day and year aforesaid, at the parish aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, designedly, and by a false pretence, to wit, by the said fraud and unlawful ill practice, did obtain from the said R. W. the said money in this count mentioned, with intent then and there to cheat and defraud him of the same, to the great injury and deception of the said R. W., in contempt of our Lady the Queen and her laws, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Precedents.

No. VI.
Indictment
under 8 & 9 Vict.
c. 109, s. 17,
for cheating at
cards.

No. VII.

Indictment for obtaining Money by the False Pretence on the part of the Defendant that he was entitled to grant a Lease of certain Freehold Property.

CENTRAL Criminal Court, } The jurors for our Lady the Queen,
to wit. } upon their oath present that P. F.,
late of the parish of Saint Luke, Chelsea, in the county of Middlesex,
labourer, on the 11th day of July, A.D. 1851, at the parish aforesaid,
in the county aforesaid, and within the jurisdiction of the Central
Criminal Court, unlawfully and knowingly did falsely pretend to one
B. E. that he the said P. F. then was the freeholder of a certain
messuage and premises, situate and being in Church-street, in the
parish aforesaid, in the county aforesaid, and that he the said P. F.
then had a good and sufficient right, title, estate, and interest in the
said messuage and premises to entitle and enable him the said P. F.
to grant to the said B. E. a lease of the said messuage and premises
for a term of twenty years, and that he the said P. F. then had power
to grant the said lease to the said B. E., and to give to the said B. E.
a good and valid title to the said messuage and premises for the said
term of twenty years, by means of which said false pretences the said
P. F. did then and there unlawfully and fraudulently obtain from the
said B. E. thirty pieces of the current gold coin of this realm called
sovereigns, ten pieces of the current silver coin of this realm called
shillings, and one promissory note of the Governor and Company
of the Bank of England, for the payment of ten pounds of the moneys
of the said B. E., with intent then and there to cheat and defraud
him of the same; whereas, in truth and in fact, the said P. F. was
not at the time he so falsely pretended as aforesaid the freeholder of the
said messuage and premises, or of any part thereof, nor had he then any
freehold estate whatever in the said messuage and premises, or in any
part thereof, as he the said P. F. then well knew; and whereas, in truth
and in fact, the said P. F. had not at the time he so falsely pretended as
aforesaid a sufficient right, title, estate, or interest to entitle or enable
him to grant any lease of the said messuage and premises for a term of

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under false
pretences.

twenty years, or any lease whatever of the said messuage and premises, or any part thereof, as he the said P. F. then well knew ; and whereas, in truth and in fact, the said P. F. had not at the time he so falsely pretended as aforesaid any right, title, estate, or interest whatever in or to the said messuage and premises, nor had he then power to grant the said lease to the said B. E., or to give to the said B. E. any title to the said messuage and premises for the said term of twenty years, or for any term of years whatever, or any title whatever to the said messuage and premises, or any part thereof, to the great damage of the said B. E., against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

Second count.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that before and at the time of the committing of the offence hereinafter next mentioned, one J. L. was the owner and proprietor of the said messuage and premises in the said first count of this indictment mentioned ; and the jurors aforesaid, upon their oath aforesaid, do further present that the said P. F., on the day aforesaid, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, unlawfully and knowingly did again falsely pretend to the said B. E. that he the said P. F. then was the freeholder of the said messuage and premises, and that the old gentleman to whom the premises formerly belonged (meaning the said J. L.) had died, and had left him the said P. F. everything, and that he the said P. F. then had a sufficient estate and interest in the said messuage and premises to entitle and enable him to grant, and then had power to grant to the said B. E. a lease of the said messuage and premises for a term of ninety years, by means of which said false pretences in this count mentioned, the said P. F. did then and there unlawfully and fraudulently obtain from the said B. E. thirty pieces of the current gold coin of this realm, called sovereigns, ten pieces of the current silver coin of this realm called shillings, and one promissory note of the Governor and Company of the Bank of England, for the payment of ten pounds of the moneys of the said B. E., with intent then and there to cheat and defraud him of the same ; whereas, in truth and in fact, the said B. F. was not at the time he so falsely pretended, as in this count mentioned, the freeholder of the said messuage and premises, or any part thereof, nor had he then any freehold estate in the said messuage and premises, or in any part thereof, as he the said P. F. then well knew ; and whereas, in truth and in fact, at the time the said P. F. so falsely pretended, as last aforesaid, the said J. L. had not died, as he the said P. F. then well knew ; and whereas, in truth and in fact, the said P. F. had not at the time he so falsely pretended as last aforesaid, a sufficient estate or interest in the said messuage and premises to entitle or enable him to grant, nor had he then any power to grant any lease for a term of twenty years, or any lease whatever of the said messuage and premises, or of any part thereof, as he the said P. F. then well knew, to the great damage of the said B. E., against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

No. VIII.

Indictment under the Pawnbrokers' Act, 39 & 40 Geo. 3, c. 99 (amended, as to the substitution of a declaration for an oath, by 5 & 6 Will. 4, c. 62, s. 12), for making a false Declaration before a Magistrate of the loss of a Duplicate. Counts under the 18th section of the last-mentioned Act.

CENTRAL Criminal Court, } The jurors for our Lady the Queen,
to wit. } upon their oath present, that before
and at the time of the committing of the offence hereinafter in this
count mentioned, one I. J. V., and one T. C., lawfully carried on the
business of pawnbrokers in the Strand, within the Metropolitan Police
District, and that whilst they so carried on their said business as afore-
said, to wit, on the 4th of September, 1850, one A. G. J. B. pawned
with them, and they then received from him in the way of their lawful
calling, to wit, at the Strand aforesaid, within the said Metropolitan
Police District, certain property, to wit, one pistol and one pistol-case,
and they then and there advanced and paid to the said A. G. J. B. a
large sum of money, to wit, the sum of 3*l.*, on the security of the said
property, and then and there duly gave to the said A. G. J. B. a memo-
randum of the particulars of the said pawning, according to the pro-
visions of a certain act of Parliament, made and passed in the session of
Parliament held in the thirty-ninth and fortieth years of the reign of His
late Majesty King George the Third, intituled *An Act for the better regu-
lating the Business of Pawnbrokers*. That afterwards, to wit, on the
7th day of September, 1850, the said A. G. J. B. transferred the said
memorandum to one H. P. C., as and for a security for money then lent
by the said H. P. C. to the said A. G. J. B., the said memorandum to
be retained by the said H. P. C. until the money so lent by him should
be repaid by the said A. G. J. B.

That afterwards, to wit, on the 19th day of April, 1851, and whilst
the said pistol and the said pistol-case were unredeemed, and whilst the
said money so lent by the said H. P. C. to the said A. G. J. B. as afore-
said was still unpaid, the said A. G. J. B. applied to the said I. J. V.
and the said T. C., and represented to them that he had lost, mislaid, or
destroyed the said memorandum, and then obtained of and from them a
copy of the same, with the form of a declaration, partly printed and
partly written, of the particular circumstances attending the case, as the
same were then and there stated to them by the said A. G. J. B., accord-
ing to the provisions of the act of Parliament aforesaid, and of a certain
other act of Parliament, made and passed in the session of Parliament
held in the fifth and sixth years of the reign of His late Majesty King
William the Fourth, intituled *An Act to Repeal an Act of the present
Session of Parliament, intituled An Act for the more effectual abolition
of Oaths and Affirmations taken and made in various Departments of
the State, and to substitute Declarations in lieu thereof, and for the more
entire suppression of voluntary and extra-judicial Oaths and Affidavits,
and to make other Provisions for the abolition of unnecessary Oaths,*
which form of declaration was in the words and figures following, that
is to say :—

made by the said A. G. J. B. in that behalf, according to the provisions of the acts of Parliament aforesaid. That the said A. G. J. B. did then and there, and within the jurisdiction of the Central Criminal Court, falsely, corruptly, knowingly, wilfully, and maliciously make and subscribe the said declaration, he then and there well knowing the same to be untrue in the material particulars following, that is to say, that he then and there well knew that he had transferred the original memorandum first above mentioned to the said H. P. C., and that he had not lost, mislaid, or destroyed the said memorandum, and that the said memorandum was then in the custody and possession of the said H. P. C., against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Precedents.
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No. VIII.
Indictment
under the
Pawnbrokers'
Act, for making
false declaration
of the loss of a
duplicate.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing of the offence hereinafter in this count mentioned, one I. J. V. and one T. C. lawfully carried on the business of pawnbrokers in the Strand, within the Metropolitan Police District, and that whilst they so carried on their said business as aforesaid, to wit, on the 4th of September, 1850, the said A. G. J. B. pawned with them, and they then received from him, in the way of their lawful calling, to wit, at the Strand aforesaid, and within the Metropolitan Police District, certain other property, to wit, one pistol and one pistol-case, and they then and there advanced and paid to the said A. G. J. B. a large sum of money, to wit, the sum of 3*l.*, on the security of the said last-mentioned property, and then and there duly gave to the said A. G. J. B. a memorandum of the particulars of the said pawning, according to the provisions of a certain act of Parliament made and passed in the session of Parliament held in the thirty-ninth and fortieth years of the reign of His late Majesty King George the Third, intituled *An Act for the better regulating the Business of Pawnbrokers*. That afterwards, to wit, on the said 7th day of September, 1850, the said A. G. J. B. transferred the said last-mentioned memorandum to the said H. P. C., as and for a security for money then lent by the said H. P. C. to the said A. G. J. B., the said memorandum to be retained by the said H. P. C. until the money so lent by him as aforesaid should be repaid by the said A. G. J. B. That afterwards, and whilst the said pistol and the said pistol-case were unredeemed, and whilst the said money so lent by the said H. P. C. to the said A. G. J. B. as last aforesaid was still unpaid, the said A. G. J. B. designing and intending to make it appear to the said I. J. V. and the said T. C. that he had not transferred the said memorandum to any person whatever, but that he had lost, mislaid, or destroyed the same, and designing and intending to obtain from the said I. J. V. and the said T. C. the pistol and the pistol-case so pawned with them as last aforesaid, it became material and necessary for the carrying out the said purposes of him the said A. G. J. B., that he should make and subscribe a solemn declaration before one of the police magistrates of the metropolis having jurisdiction as a justice of the peace within the district where the said last-mentioned pistol and the said last-mentioned pistol-case were so as aforesaid pawned, that he the said A. G. J. B. had not sold or transferred the said memorandum to any person or persons whatsoever, but that he had lost, mislaid, or destroyed the same. That, in pursuance of the said design and intention, the said A. G. J. B. afterwards, to wit, on the 19th of April, 1851, at the parish aforesaid, in the county aforesaid, within the Metropolitan Police District, and within the jurisdiction of the Central

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Pawnbrokers'
Act, for making
false declaration
of the loss of a
duplicate.

Criminal Court, did go before D. J., Esq., then and there being one of the police magistrates of the metropolis, sitting at Bow-street Police Court, and then acting in and for the said Metropolitan Police District, and did then and there, and within the said jurisdiction, voluntarily make and subscribe a declaration before the said D. J., Esq., he the said D. J., Esq., then and there having sufficient and competent authority to take and receive such declaration so voluntarily made by the said A. G. J. B. in that behalf, according to the provisions of the said statute, and that the said A. G. J. B. then and there, by his said last-mentioned declaration, so then and there made by him, did falsely, wilfully, and corruptly, solemnly declare, among other things, before the said D. J., Esq., then and there having such sufficient and competent authority as aforesaid, in substance and to the effect following, that is to say, that he the said A. G. J. B. had not then transferred the said last-mentioned memorandum to any person whatsoever, and that he the said A. G. J. B. had lost, mislaid, or destroyed the same, whereas, in truth and in fact, the said A. G. J. B. then and there well knew that he had then transferred the said memorandum to the said H. P. C., and that he had not lost, mislaid, or destroyed the said memorandum, but that the said memorandum was then in the custody and possession of the said H. P. C. And so the jurors aforesaid, upon their oath aforesaid, do say that the said A. G. J. B., in manner and form aforesaid, did falsely, wilfully, and corruptly make the said last-mentioned declaration, he then and there well knowing the same to be false, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. G. J. B. afterwards, to wit, on the 19th of April, 1851, at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, came in his own proper person before the said D. J., Esq., then being one of the Metropolitan police magistrates sitting in and for the Metropolitan Police District, and then sitting at Bow-street Police Court, within the said district, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, for the purpose and in order that the said A. G. J. B. might then and there, under and in pursuance of the provisions of the said acts of Parliament in the first count of this indictment mentioned, make, subscribe, and solemnly declare the truth of a certain declaration of him the said A. G. J. B., partly printed and partly written, which he the said A. G. J. B. then and there for the purposes aforesaid produced to the said D. J., Esq. (he the said D. J., Esq., then and there having a competent power and authority to take and receive the said last mentioned declaration.) That at the time of the production by the said A. G. J. B. of the said last-mentioned declaration before the said D. J., Esq., as aforesaid, and at the time the said A. G. J. B. made and subscribed the said last-mentioned declaration, and so solemnly declared as hereinafter in this count mentioned, it then and there became and was material to and in respect of the purpose for which the said A. G. J. B. made and subscribed the said last-mentioned declaration and so solemnly declared as hereinafter mentioned, to inquire whether the said A. G. J. B. had lost, mislaid, or destroyed a certain note or memorandum in the said last-mentioned declaration mentioned, and whether the said A. G. J. B. had transferred the said last-mentioned note or memorandum to any other person. That the said A. G. J. B. then and there, and within the said

jurisdiction, before the said D. J., Esq. (he the said D. J., Esq., then and there having such lawful and competent power and authority as last aforesaid), falsely, wilfully, corruptly, and maliciously did make and subscribe the said last-mentioned declaration, and then and there falsely, wilfully, corruptly, maliciously, and well knowing the contrary thereof to be true, did solemnly declare the said last-mentioned declaration to be true, and then and there, in and by the said declaration, did solemnly declare, amongst other things, in substance and to the effect following, that is to say, that he the said A. G. J. B. had then lost, mislaid or destroyed the said note or memorandum in the said last-mentioned declaration mentioned, and that he, the said A. G. J. B. had not sold or transferred the said last-mentioned note or memorandum to any person or persons whatsoever; whereas, in truth and in fact, the said A. G. J. B., at the said time when he so made and subscribed the said last-mentioned declaration, and so solemnly declared as in this count mentioned, then and there well knew that the said last-mentioned declaration was untrue, in this that he the said A. G. J. B. had not then lost, mislaid, or destroyed the said last-mentioned note or memorandum, as he, the said A. G. J. B. then and there well knew, and that he the said A. G. J. B. had then transferred the said last-mentioned note or memorandum, to wit, to the said H. P. C., to wit, as a security for money lent by the said H. P. C. to the said A. G. J. B., as he the said A. G. J. B. then and there well knew, against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

Fourth Count.(a)—And the jurors aforesaid, upon their oath aforesaid, do further present, that before the time of the committing the offence next hereinafter mentioned, to wit, on the 31st of August, 1850, to wit, at the parish aforesaid, in the county aforesaid, the said A. G. J. B. had deposited with the said I. J. V. and the said T. C., certain other property, to wit, two guns and two gun-cases, and that the said I. J. V. and the said T. C., then and there received the same, and they then and there advanced and paid to the said A. G. J. B. a large sum of money, to wit, the sum of 21l. 13s. on the security of the said last-mentioned property, and then and there gave to the said A. G. J. B., a memorandum of the particulars of the said deposit as a voucher for the same. That afterwards, to wit, on the said 31st day of August, 1850, to wit, at the parish aforesaid, in the county aforesaid, the said A. G. J. B. transferred the said last mentioned memorandum to the said H. P. C. as and for a security for money then and there lent by the said H. P. C. to the said A. G. J. B., the said memorandum to be retained by the said H. P. C. until the money so lent by him as aforesaid should be repaid by the said A. G. J. B. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the said two guns and the said two gun-cases were unredeemed from the said I. J. V. and the said T. C., and whilst the said money so lent by the said H. P. C. to the said A. G. J. B., as last aforesaid, was still unpaid, the said A. G. J. B. fraudulently designing and intending to make it appear to the said I. J. V. and the said T. C. that he had not transferred the said memorandum to any person whatever, but that he had lost, mislaid, or destroyed the same, and fraudulently designing and intending to obtain

Precedents.

No. VIII.

Indictment
under the
Pawnbrokers'
Act, for making
false declaration
of the loss of a
duplicate.

(a) The three last counts were framed under the 18th section of the 5 & 6 Will. 4, c. 62, inasmuch as the sum advanced in the transaction they refer to was above 10l., and therefore not within the operation of the Pawnbrokers' Act.

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from the said I. J. V. and the said T. C. the two guns and the two gun-cases so deposited with them as aforesaid, it became material and necessary for the carrying out the said fraudulent design and intention of him the said A. G. J. B., that he should make and subscribe a solemn declaration before some one justice of the peace or other person authorized by law to receive and take the same according to the provisions of the said act of Parliament made and passed in the session of Parliament holden in the fifth and sixth years of the reign of His late Majesty King William the Fourth, that he the said A. G. J. B. had not transferred the said last memorandum to any person whatsoever, but that he had lost, mislaid, or destroyed the same. And the jurors, upon their oath aforesaid, do further present, that in pursuance of the fraudulent design and intention aforesaid, the said A. G. J. B. afterwards, to wit, on the 19th day of April, in the year of our Lord 1851, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the Central Criminal Court, did go before D. J., Esq., then and there being one of the police magistrates of the Metropolis, then sitting at Bow-street Police Court for and then acting within the said Metropolitan Police District, and did then and there falsely, corruptly, and wilfully, voluntarily make and subscribe a declaration before the said D. J., Esq. (he the said D. J., Esq., then and there having sufficient and competent authority to take and receive such declaration so voluntarily made by the said A. G. J. B. in that behalf, according to the provisions of the statute last above-mentioned), which said declaration is in the words and figures following, that is to say:—

**** Unless this printed form is taken at once before a magistrate, declared to, signed, and returned to the pawnbroker, the property will be delivered to the ticket.**

Copy of the Note or Memorandum.

[illegible]

V. and C. (late D.),
39, Strand.

31st August, 1850.

£21 : 13 : 0

Two Guns in Cases.

Mr. A. G. J. B.

[D.] MIDDLESEX, to wit. [Declaration.]

I, A. G. J. B., of No. 24, Brook-street, Kennington-road, do solemnly and sincerely declare, that I deposited, at the shop of Messrs. V. & C., 39, Strand, the articles as described in the margin, being my own property, and received a note or memorandum (meaning thereby the memorandum aforesaid) which I have since lost, mislaid, or destroyed, and that I have not sold or transferred the same to any person or persons whatsoever, and I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of an act made and passed in the fifth and sixth years of the reign of His late Majesty King William the Fourth, intituled *An Act to repeal an Act of the present Session of Parliament, intituled An Act for the more effectual abolition of Oaths and Affirmations taken and made in various Departments of the State, and to substitute Declarations in lieu thereof, and for the more entire Suppression of voluntary and extra-judicial Oaths and Affidavits, and to make other Provisions for the abolition of unnecessary Oaths.*

Declared before a police magistrate of the Metropolis, }
this 19th day of April, 1851. } A. G. J. B.

F. Nicholls, Printer, 2, Milton-street, Finsbury.

And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time the said A. G. J. B. so made and subscribed the said last-mentioned declaration as aforesaid, he then and there well knew, as the fact was, that he had transferred the said memorandum to the said H. P. C., and that he had not lost, mislaid, or destroyed the said memorandum, but that the said memorandum was then in the custody and possession of the said H. P. C. And so the jurors aforesaid, upon their oath aforesaid, do say that the said A. G. J. B. then and there, and in manner aforesaid, did falsely, wilfully, and corruptly make a false declaration, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

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Fifth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that before the time of the committing the offence hereinafter next mentioned, to wit, on the 31st day of August, in the year of our Lord 1850, to wit, at the parish aforesaid, in the county aforesaid, the said A. G. J. B. had deposited with the said I. J. V. and the said T. C. certain other property, to wit, two guns and two gun-cases, and the said I. J. V. and the said T. C. then and there received the same, and then and there advanced and paid to the said A. G. J. B. a large sum of money, to wit, the sum of twenty-one pounds thirteen shillings, on the security of the said last-mentioned property, and then and there gave to the said A. G. J. B. a memorandum of the particulars of the said deposit, for and as a voucher for the same. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the said 31st day of August, in the year of our Lord 1850, to wit, at the parish aforesaid, in the county aforesaid, the said A. G. J. B. transferred the said memorandum to the said H. P. C., as and for a security for money then and there lent by the said H. P. C. to the said A. G. J. B., the said memorandum to be retained by the said H. P. C. until the money so lent by him as aforesaid should be repaid by the said A. G. J. B.; and the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the two last-mentioned guns and the said two last-mentioned gun-cases were unredeemed, and whilst the said last-mentioned money so lent by the said H. P. C. to the said A. G. J. B. was still unpaid, the said A. G. J. B. fraudulently designing and intending to make it appear to the said I. J. V. and the said T. C. that he had not transferred the said last-mentioned memorandum to any person whatever, but that he had lost, mislaid, or destroyed the same, and designing and intending to injure and defraud the said I. J. V. and the said T. C., and to obtain from them the two last-mentioned guns and the two last-mentioned gun-cases so deposited with them as aforesaid, it became material and necessary for the carrying out the said fraudulent design and intention of him the said A. G. J. B., that he should make and subscribe a solemn declaration before some one justice of the peace, or other person authorized by law to receive and take the same, according to the provisions of the said act of Parliament made and passed in the session of Parliament holden in the fifth and sixth years of the reign of His late Majesty King William the Fourth, that the said A. G. J. B. had not transferred the said last-mentioned memorandum to any person or persons whatsoever, but that he had lost, mislaid, or destroyed the same. And the jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the fraudulent design and intention aforesaid, the said A. G. J. B. afterwards, to wit, on the 19th day of April, in the

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year of our Lord 1851, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the Central Criminal Court, did go before D. J., Esq., then and there being one of the police magistrates of the Metropolis then sitting at Bow-street Police Court, and then acting within and for the said Metropolitan Police District, and did then and there, and within the jurisdiction of the Central Criminal Court, falsely, corruptly, and wilfully, voluntarily make and subscribe a declaration before the said D. J., Esq., he the said D. J., Esq., then and there, and within the said jurisdiction, having sufficient and competent authority to take and receive such declaration so voluntarily made by the said A. G. J. B. in that behalf, according to the form in the schedule annexed to the statute last above-mentioned; and that the said A. G. J. B., by his said declaration so then and there made by him under and by virtue of the said last-mentioned act of Parliament, did falsely, corruptly, and wilfully, solemnly declare among other things before the said D. J., Esq. (he then and there having such sufficient and competent authority as aforesaid), in substance and to the effect following, that is to say, that he the said A. G. J. B. had not transferred the said last-mentioned memorandum to any person or persons whatsoever, and that he the said A. G. J. B. had lost, mislaid, or destroyed the same; whereas, in truth and in fact, the said A. G. J. B., at the time he so made the said last-mentioned declaration, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, well knew, as the fact then was, that he had transferred the said memorandum to the said H. C., and that he had not lost, mislaid, or destroyed the said memorandum, but that the said memorandum was then in the custody and possession of the said H. C. And so the jurors aforesaid, upon their oath aforesaid, do say that the said A. G. J. B. did then and there, and within the said jurisdiction, falsely, corruptly, and wilfully, voluntarily make and subscribe the said last-mentioned declaration, knowing the same to be false, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Sixth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. G. J. B. afterwards, to wit, on the 19th day of April, in the year of our Lord 1851, at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, came in his own proper person before the said D. J., Esq., then being one of the Metropolitan police magistrates acting in and for the Metropolitan Police District, and then sitting at Bow-street Police Court, within the said district, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, for the purpose and in order that he the said A. G. J. B. might then and there, under and in pursuance of the provisions of the said act of Parliament, made and passed in the session of Parliament holden in the fifth and sixth years of the reign of His late Majesty King William the Fourth, make, subscribe, and solemnly declare the truth of a certain declaration of him the said A. G. J. B., partly printed and partly written, which he the said A. G. J. B. then and there, for the purpose aforesaid, produced to the said D. J., Esq. (he the said D. J., Esq., then and there having a competent power and authority to take and receive the said last-mentioned declaration in that behalf.) And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time of the production by the said A. G. J. B. of the said last-mentioned declaration

before the said D. J., Esq., as aforesaid, and at the time the said A. G. J. B. made and subscribed the said last-mentioned declaration, and so solemnly declared, as hereinafter in this count mentioned, it then and there became and was material to and in respect of the purpose for which the said A. G. J. B. made and subscribed the last-mentioned declaration, and so solemnly declared as hereinafter mentioned, to inquire whether the said A. G. J. B. had lost, mislaid, or destroyed a certain note or memorandum in the said last-mentioned declaration mentioned; and whether the said A. G. J. B. had transferred the said last-mentioned note or memorandum to any person or persons whatsoever. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. G. J. B. then and there before the said D. J., Esq. (he the said D. J., Esq., then and there having such lawful and competent power and authority as last aforesaid), falsely, wilfully, corruptly, and maliciously did make and subscribe the said last-mentioned declaration, and then and there and within the said jurisdiction, falsely, wilfully, corruptly, maliciously, and well knowing the contrary thereof to be true, did solemnly declare the said last-mentioned declaration to be true, and then and there in and by the said declaration did solemnly declare, among other things, in substance and to the effect following, that is to say, that he the said A. G. J. B. had then lost, mislaid, or destroyed the said note or memorandum in the said last-mentioned declaration mentioned, and that he the said A. G. J. B. had not sold or transferred the said last-mentioned note or memorandum to any person or persons whatsoever; whereas, in truth and in fact, the said A. G. J. B., at the said time when he so made and subscribed the said last-mentioned declaration, and so solemnly declared, as in this count mentioned, then and there well knew that the said last-mentioned declaration was untrue in this, that he the said A. G. J. B. had not then lost, mislaid, or destroyed the said last-mentioned note or memorandum, as he the said A. G. J. B. then and there well knew, and that he the said A. G. J. B. had transferred the said last-mentioned note or memorandum, to wit, to the said H. P. C., to wit, as a security for money lent by the said H. P. C. to the said A. G. J. B., as he the said A. G. J. B. then and there well knew, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

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Act, for making
false declaration
of the loss of a
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No. IX.

Indictment for Perjury on a trial at Nisi Prius in the Court of Exchequer.

CENTRAL Criminal Court, } The jurors for our Lady the Queen,
to wit. } upon their oath present, that heretofore and after the first day of November, in the year of our Lord 1851, to wit, at the sittings of Nisi Prius, holden in Michaelmas Term on the 24th day of November, in the fifteenth year of the reign of our Sovereign Lady Victoria, and in the year of our Lord 1851, at West-

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minster Hall, in and for the county of Middlesex, before Sir Thomas Joshua Platt, Knight, one of the Barons of Her Majesty's Exchequer at Westminster aforesaid, in the absence and in the place and stead of the Right Honourable Sir Frederick Pollock, Knight, then being Chief Baron of Her Majesty's Exchequer aforesaid, and within the jurisdiction of the Central Criminal Court, certain issues theretofore duly joined in a certain action on the case then depending in the said Court of Exchequer, wherein one T. B. was the plaintiff, and one G. H. was the defendant, came on to be tried in due form of law, and the same were then and there, that is to say, on the said 24th day of November, in the year aforesaid, and by adjournment on the 25th day of November, in the year aforesaid, duly tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid, and that upon the said trial the said T. B., late of the parish of St. Pancras, in the county of Middlesex, labourer, then and there, and within the jurisdiction of the said Central Criminal Court, appeared as a witness, and to give evidence for and on behalf of himself the said T. B., as such plaintiff in the action aforesaid (the said action not being an action, suit, proceeding, or bill in any Court of Common Law, nor any other proceeding whatsoever instituted in consequence of adultery, nor an action for breach of promise of marriage), and that the said T. B. was then and there, and within the jurisdiction of the said Central Criminal Court, duly sworn and took his corporal oath upon the Holy Gospel of God, before the said Sir Thomas Joshua Platt, Knight, so being such baron as aforesaid, that the evidence which he the said T. B. should give to the said Court there and to the said jury so sworn as aforesaid, touching the matters then in question between the said parties, should be the truth, the whole truth, and nothing but the truth (he the said Sir Thomas Joshua Platt, Knight, so being such baron as aforesaid, then and there having sufficient and competent power and authority to administer the said oath to the said T. B. in that behalf.) And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said T. B., for a long space of time, to wit, from the 25th day of March, in the year of our Lord 1844, and from thence until and upon the 21st day of June, in the year of our Lord 1851, was and still is tenant to the said G. H. of a certain dwelling-house and premises, with the appurtenances, situate and being in the county aforesaid, at and under a certain rent theretofore payable by the said T. B. to the said G. H.; and that before the commencement of the said action, to wit, on the said 21st day of June, in the year of our Lord 1851, aforesaid, a certain distress had been made and levied by the said G. H. upon certain goods and chattels of the said T. B., for and in respect of certain arrears of the said rent at the time of making and levying the said distress claimed to be due and owing from the said T. B. to the said G. H. And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said T. B., before the commencement of the said action, to wit, in the year of our Lord 1848, was indebted to one W. H. D. in a certain sum of money for certain costs due and payable by the said T. B. to the said W. H. D. And the jurors first aforesaid, upon their oath aforesaid, do further present, that upon the trial of the said issues so joined between the said parties as aforesaid, the following questions arose, and then and there became and were material questions, and each and every of them then and there became and was a material question upon the trial of the said issues (that is to say), for and in respect of how long a space of time rent was due

and in arrear from the said T. B. to the said G. H., at the time of making and levying the said distress, and whether, at the time of making and levying the said distress, rent was due and in arrear from the said T. B. to the said G. H., for and in respect of a longer space of time than one quarter of a year; and whether, at the time of making and levying the said distress, rent was due and in arrear from the said T. B. to the said G. H., for and in respect of the space of one whole year and one quarter of another year; and also whether, from the month of August, in the year of our Lord 1848, to the month of February, in the year of our Lord 1851, the said T. B. had paid each quarter of a year's rent of the rent aforesaid, in one sum or by instalments; and whether the last five quarters' rent of the rent aforesaid, paid by the said T. B. next before the 5th day of February, in the year of our Lord 1851, were paid by instalments; and also whether, in the month of August, in the year of our Lord 1850, one J. H., the son of the said G. H., called on the said T. B., and then and on that occasion asked the said T. B. if he the said T. B. could pay a part of the then running quarter of a year's rent in advance, and which would become due to the said G. H. at Michaelmas, in the year last aforesaid; and whether the said T. B. did then and on such occasion pay to the said J. H. the sum of 10*l.*, or any other sum of money, in advance, on account of rent which was not due at that time. And also whether or not the said T. B. did, in the year of our Lord 1848, agree to pay the said costs so due to the said W. H. D. as aforesaid, by instalments. And whether the said T. B. did pay the amount of such costs to the said W. H. D. by instalments, or all at once. And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said T. B., being so sworn as aforesaid, not having the fear of God before his eyes, nor regarding the laws of this realm, and contriving and intending to pervert the due course of law and justice, and unjustly to aggrieve the said G. H., the defendant in the said action, and to cause a verdict to pass against the said G. H., on the trial of the said issues, and thereby to subject him the said G. H. to the payment of sundry heavy damages, costs, charges and expenses, then and there and within the jurisdiction of the said Central Criminal Court (to wit), on the said 24th day of November, in the year first aforesaid, at Westminster aforesaid, in the county aforesaid, on the trial of the said issues, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully and maliciously, before the said jurors so sworn there as aforesaid, and before the said Sir Thomas Joshua Platt, Knight, so being such baron as aforesaid, did depose and swear (amongst other things), in substance, and to the effect following, that is to say, there was only the rent for one quarter (meaning only one quarter of a year's rent of the rent aforesaid), due at the time of the distress (meaning the said distress and the said time of making and levying the same, and thereby then meaning that at the time of making and levying the said distress, rent was due and in arrear from him the said T. B. to the said G. H., for and in respect of the space of one quarter of a year only, and no longer.) And that from the month of August, 1848 (meaning the month of August in the year of our Lord 1848), he (meaning the said T. B.) paid every quarter's rent (meaning each quarter of a year's rent of the rent aforesaid), at one payment (thereby then meaning that from the time last aforesaid each quarter of a year's rent of the rent aforesaid, paid by the said T. B., had been paid in one sum, and not by instalments.) And that the last five

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quarters' rent (meaning the rent for one year, and the quarter of another year, paid by the said T. B., next before the said 5th day of February, in the year of our Lord 1851), were not paid by instalments, and that the rent (meaning the rent for the period last aforesaid), was paid in quarterly payments (not by instalments.) And that in August, 1850 (meaning the month of August in the year of our Lord 1850 aforesaid), the son (meaning the said J. H., the son of the said G. H.), called and said his father (meaning the said G. H., the father of the said J. H.), had a large sum to make up, and he (meaning the said J. H.) asked him (meaning the said T. B.) if he (meaning the said T. B.) could pay a part of that quarter's rent in advance (thereby then meaning that in the said month of August, in the year of our Lord 1850, the said J. H. called and asked the said T. B. to pay a part of the then running and current quarter of a year's rent in advance, and which would not become due to the said G. H. from the said T. B. until Michaelmas, in the year last aforesaid.) And that he the said T. B. then (meaning in the month and year, and on the supposed occasion last aforesaid) paid to the said J. H. 10*l.* for the rent that was not due at that time (thereby then meaning that the said T. B., on the occasion last aforesaid, paid to the said J. H. the sum of 10*l.* in advance on account of the then running and current quarter of a year's rent of the rent aforesaid, and which was not due at that time.) And that he (meaning the said T. B.) did not, in the year 1848 (meaning the year of our Lord 1848), agree to pay D.'s costs (meaning the said costs so due to the said W. H. D. as aforesaid) by instalments. And that he (meaning the said T. B.) paid the amount (meaning the amount of the costs aforesaid) all at once. Whereas, in truth and in fact, upon the occasion and at the time of making and levying the said distress, that is to say, on the said 21st day of June, in the year of our Lord 1851 aforesaid, rent was due and in arrear from the said T. B. to the said G. H., for and in respect of a longer space of time than one quarter of a year. And whereas, in truth and in fact, upon the occasion and at the time of levying and making the said distress, to wit, on the said 21st day of June, in the year last aforesaid, rent was due and in arrear from the said T. B. to the said G. H., for and in respect of the space of one whole year, and one quarter of another year. And whereas, in truth and in fact, each quarter of a year's rent of the rent aforesaid, paid by the said T. B., from the month of August in the year of our Lord 1848, had not been paid in one sum, but, on the contrary thereof, each and every such quarter of a year's rent paid by the said T. B. during the time last aforesaid, except three of such quarters, had been and was paid by instalments, and not in one sum. And whereas, in truth and in fact, the last five quarters' rent, that is to say, the rent aforesaid for one year and the quarter of another year, paid by the said T. B. next before the said 5th day of February, in the year of our Lord 1851, were paid by instalments, and the rent aforesaid, for the period last aforesaid, was paid by instalments, and not in quarterly payments. And whereas, in truth and in fact, the said J. H. did not, in the said month of August, in the year of our Lord 1850, nor in any other month in the said last-mentioned year, nor at any other time nor on any occasion whatsoever, say to the said T. B. that his the said J. H.'s father (meaning the said G. H.) had a large sum of money to make up, nor did he the said J. H., then or at any other time or on any occasion whatsoever, ask the said T. B. if he the said T. B. could pay a part of that quarter's rent in advance, nor did he the said J. H.

then or on any occasion whatsoever ask the said T. B. to pay a part of a quarter's rent or any rent whatsoever in advance or before the same had become due and payable from the said T. B. to the said G. H. And whereas, in truth and in fact, the said T. B. did not in the said month of August, in the year of our Lord 1850, and on the occasion of the said supposed application, pay to the said J. H. 10*l*. nor any other sum of money whatsoever for the rent that was not due at that time, nor did he the said T. B. then pay to the said J. H. any sum of money whatsoever, nor did the said T. B. then or in any other month in the year last aforesaid, nor on any other occasion nor at any other time whatsoever, pay to the said J. H. the sum of 10*l*. nor any sum of money whatsoever in advance or for rent that was not due at the time or on any other account whatsoever. And whereas in truth and in fact, before the commencement of the said action, that is to say, upon the 12th day of May, in the year of our Lord 1848, the said T. B. did agree to pay the said costs so due to the said W. H. D. as aforesaid by instalments, that is to say, by instalments of 5*l*. a month. And whereas in truth and in fact, the said T. B., before the commencement of the said action, did pay the amount of such costs to the said W. H. D. by instalments of 5*l*. a month, and not all at once. And so the jurors first aforesaid, upon their oath aforesaid, do say that the said T. B., on the said 24th day of November, in the year of our Lord 1851 aforesaid, at Westminster aforesaid, and within the jurisdiction of the said Central Criminal Court, before the said Sir Thomas Joshua Platt, Knight (he the said Sir Thomas Joshua Platt, Knight, then and there having such power and authority as aforesaid), by his own act and consent, and of his own most wicked and corrupt mind in manner and form aforesaid, falsely, wickedly, wilfully and corruptly did, upon the said trial of the said issues, commit wilful and corrupt perjury, in contempt of our Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Second Count.—And the jurors first aforesaid, upon their oath aforesaid, do further present, that heretofore and after the 1st day of November, in the year of our Lord 1851, to wit, at the sittings of Nisi Prius, holden in Michaelmas Term, on the 24th day of November, in the fifteenth year of the reign of our Sovereign Lady Victoria, and in the year of our Lord 1851 aforesaid, at Westminster Hall, in and for the county of Middlesex aforesaid, before Sir Thomas Joshua Platt, Knight, one of the barons of Her Majesty's Exchequer at Westminster aforesaid, in the absence and in the place and stead of the Right Honourable Sir Frederick Pollock, Knight, then being Chief Baron of Her Majesty's Exchequer aforesaid, and within the jurisdiction of the Central Criminal Court aforesaid, certain issues theretofore duly joined in a certain action on the case then depending in the said Court of Exchequer, wherein the said T. B. was the plaintiff and the said G. H. was the defendant, came on to be tried in due form of law, and the same were then and there, that is to say, on the said 24th day of November, in the year last aforesaid, and by adjournment on the 25th day of November, in the year last aforesaid, duly tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid, and that upon the said trial the said T. B. then and there, and within the jurisdiction of the said Central Criminal Court, appeared as a witness, and to give evidence for and on behalf of himself the said T. B. as such plaintiff in the said action, the said action not being an action, suit, proceeding, or bill in any court of

Procedendo.

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No. IX.
Indictment for
perjury.

No. X.

Indictment for Perjury committed upon the Trial of an Indictment at the Central Criminal Court.

CENTRAL Criminal Court, } The jurors for our Lady the Queen,
to wit. } upon their oath present, that at a
General Session of the delivery of the Queen's gaol of Newgate, holden
for the jurisdiction of the said Central Criminal Court at Justice Hall,
in the Old Bailey, in the suburbs of the city of London, on Monday, the
12th day of May, A.D. 1851, before the Right Honourable Sir John
Musgrove, Baronet, Lord Mayor of the city of London, Sir Edward
Hall Alderson, Knight, one of the barons of Her Majesty's Court of
Exchequer, Sir Thomas Noon Talfourd, Knight, one of the justices of
Her Majesty's Court of Common Pleas, Thomas Quessted Finnis, Esq.,
one of the aldermen of the said city, William Lawrence, Esq., one of the
aldermen of the said city, Russell Gurney, Esq., judge of the Sheriff's
Court of the said city, and others, their fellow justices, assigned to
deliver the said gaol of Newgate of the prisoners therein being, one
W. D., was, in due form of law, tried by a certain jury upon a certain
indictment, then and there depending against him for unlawfully, by
false pretences, false representations and fraudulent means, within the
jurisdiction of the said Central Criminal Court, attempting and
endeavouring to procure one A. H. N., a woman under the age of
twenty-one years, to wit, of the age of nineteen years, to have illicit
carnal connexion with a certain man unknown; and the jurors first
aforesaid, upon their oath aforesaid, do further present that at and upon
the trial aforesaid the said A. H. N., late of the parish of , in
the city of London aforesaid, singlewoman, did appear as witness for and
on behalf of our said Lady the Queen, and then and there before the
said T. Q. F., Esq., and the said R. G., Esq., to wit, at the said Session
of Gaol Delivery, on the day and year aforesaid, in the city of London,
and within the jurisdiction of the said court, was in due manner sworn,
and did take her corporal oath upon the Holy Gospel of God, to speak the
truth, the whole truth and nothing but the truth, as such witness aforesaid,
the said T. Q. F. and the said R. G., Esq., then and there having sufficient
and competent lawful power and authority to administer the said oath to
the said A. H. N. in that behalf; and the jurors aforesaid, upon their
oath aforesaid, do further present that at and upon the said trial of the
said W. D., upon the said indictment as aforesaid, it then and there
became and was a material question and subject of inquiry, whether the
said A. H. N. knew who wrote a certain letter then and there produced
and shown to the said A. H. N.; and whether she had at any time, but
more particularly on or about the 30th March, A. D. 1851, gone to the
house of one J. W. for the purpose of getting her the said J. W. to
write a letter for her the said A. H. N., and whether the said first-men-
tioned letter had been written at her the said A. H. N.'s request by the
said J. W., and whether the said A. H. N. had, in giving a reason to the
said J. W. why she wanted the letter written, made a statement in sub-

stance and to the effect following, that is to say : it is only for a lark, Mrs. W., with R. R. and a lot of us ; and whether she the said A. H. N. on the 31st day of March, A. D. 1851, had seen the said W. D. near a certain place called "The Ben Jonson," and whether any conversation then took place between her and the said W. D., and whether the said W. D. then told her the said A. H. N. he would take her to one R. R., and whether the said W. D., together with a certain cabman, then compelled her to get into a certain cab, and whether she the said A. H. N. then screamed and resisted the attempt to force her into the said cab, and whether the said W. D. then got into the said cab, and whilst she was in the said cab, as she so alleged, held her hands while he put a handkerchief to her mouth, and whether she was then driven in the said cab through certain streets to a certain house, and whether she was subjected to violence and ill-treatment by any persons in the said house, and whether whilst she was in the said house she had been compelled to defend herself with a certain knife which a certain girl in the said house had given her, and whether she the said A. H. N. had, whilst so defending herself, cut a certain man in the hand with the said knife, and whether she had, whilst in the said house, been compelled to drink a certain liquid which partially stupified her, and whether she had, on the occasion in question, seen the said W. D. in the said house, and whether the said W. D. then told her he would take her back to her father, and whether the said W. D. then took her in the said cab along the streets until they came to a dark street, and whether the said W. D. then got out of the cab with her and walked with her a certain distance, and whether the said W. D. then put a certain direction in her hand and told her she must find her way home the best way she could ; and whether she had afterwards gone with the said J. W. to ask the friends of the said W. D. for money, and whether one E. N., the aunt of the said A. H. N., had ever charged her the said A. H. N. with robbing her, and whether she the said A. H. N. had ever attempted to drown herself ; and the jurors aforesaid, upon their oath aforesaid, do further present that the said A. H. N., being so sworn as aforesaid, not having the fear of God before her eyes, but devising and wickedly intending to injure and aggrieve the said W. D. and to deceive the said court in the premises, then and there before the said T. Q. F., Esq., and the said R. G., Esq., then and there having such competent and lawful power and authority to administer the said oath to her as aforesaid, at the said session of gaol delivery, to wit, on the said 12th day of March, A. D. 1851, at the parish aforesaid, in the city of London aforesaid, and within the jurisdiction of the said Central Criminal Court, as such witness as aforesaid upon the trial aforesaid, and whilst it was such material question and subject of inquiry as aforesaid, unlawfully, falsely, knowingly, wilfully and corruptly did depose, swear and give evidence among other things in substance and to the effect following, that is to say, that she the said A. H. N. did not know who wrote the before-mentioned letter, which was then and there produced and shown to her, and that she did not on or about the 30th day of March, nor at any other time, go to the house of J. W., meaning J. W. aforesaid, for the purpose of getting her the said J. W. to write a letter for her the said A. H. N., and that the said letter above mentioned had not been written at her the said A. H. N.'s request by Mrs. W. (meaning thereby J. W.) aforesaid, nor had she the said A. H. N. requested any person whatsoever to write the said letter ; that she the said A. H. N. had not in giving a reason to the said J. W.

Precedents.

No. X.
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why she wanted the said letter written, made a statement in substance and to the effect following, that is to say, it is only for a lark, Mrs. W., with R. R. and a lot of us ; that she the said A. H. N., on the 31st day of March, A. D. 1851, saw the said W. D. near "The Ben Jonson" (meaning "The Ben Jonson" aforesaid"), and that a conversation then took place between her and the said W. D., and that the said W. D. then told her the said A. H. N. he would take her to R. R. (meaning R. R. aforesaid), and that the said W. D., together with a certain cabman, then compelled her to get into a certain cab, and that she then screamed and resisted the attempt to force her into the said cab, and that the said W. D. then got into the said cab with her, and whilst she was in the said cab held her hands while he put a handkerchief to her mouth ; that she was then driven in the said cab through certain streets to a certain house, and that she was then subjected to violence and ill treatment by three gentlemen in the said house, who struggled with her and tried to force her up stairs, and that whilst she was in the said house she was compelled to defend herself with a knife, which some girl in the said house had given her for that purpose, and that she the said A. H. N., whilst so defending herself, cut one of the said gentlemen in the hand with the said knife ; that she had whilst in the said house been compelled to drink a certain liquid which partially stupified her, and that on the occasion in question she had seen the said W. D. in the said house, and that in consequence of the resistance she made to the violence and ill treatment to which she had been subjected in the said house, the said W. D. told her if she would be quiet he would take her back to her father, and that the said W. D. then took her again in the said cab along the streets until they came to a dark street, and that the said W. D. then got out of the cab with her and walked with her a certain distance, and the said W. D. then put a certain direction in her hand and told her she must find her way home the best way she could ; that she had never gone with the said J. W. to ask the friends of the said W. D. for money ; and that her aunt (meaning the said E. N.) had never charged her the said A. H. N. with robbing her, and that she the said A. H. N. had never attempted to drown herself. Whereas in truth and in fact the said A. H. N., at the time she so deposed and swore as aforesaid, well knew who wrote the above-mentioned letter ; and whereas in truth and in fact she did go on or about the 30th day of March, in the year aforesaid, to the house of the said J. W. for the purpose of getting her the said J. W. to write the said letter for her the said A. H. N. ; and whereas in truth and in fact the said letter so shown to her on the said trial as aforesaid was written at her the said A. H. N.'s request by the said J. W. ; and whereas in truth and in fact the said A. H. N., in giving a reason to the said J. W. why she wanted the said letter written, made a statement in substance and to the effect following, that is to say, it was only for a lark, Mrs. W., with R. R. and a lot of us ; and whereas in truth and in fact the said A. H. N. did not on the 31st day of March, A. D. 1851, see the said W. D. near "The Ben Jonson" aforesaid, nor at any other place, and that no conversation then took place between them, nor did the said W. D. then tell her he would take her to the said R. R., nor did the said W. D., either alone or with any other person, compel her to go into any cab, nor did she then scream and resist the attempt to force her into the said cab, nor did he the said W. D. then get into the said cab with her, nor did he whilst she was in such cab or elsewhere hold her hands while he put a handkerchief to her mouth ; and whereas in truth and in fact

the said A. H. N. was not driven to any house where she was subjected to, nor was she compelled to defend herself from any violence or ill treatment whatsoever ; and whereas in truth and in fact, the said W. D. did not tell her the said A. H. N. that if she would be quiet he would take her back to her father ; nor did he take her in any cab along the street until they came to a dark street, nor did he get out of any cab with her and walk with her, nor did he put any direction in her hand, nor tell her she must find her way home in the best way she could ; and whereas in truth and in fact the said A. H. N. did on or about the 30th day of March, A. D. 1851, go with the said J. W. to ask the friends of the said W. D. for money ; and whereas in truth and in fact her aunt the said E. N. had frequently charged her the said A. H. N. with robbing her ; and whereas in truth and in fact the said A. H. N. did, to wit, on or about the day of A. D. attempt to drown herself ; and whereas in truth and in fact the said W. D., on the day the said A. H. N. swore she met with him as aforesaid, never saw nor spoke to nor was in company with the said A. H. N., nor was he near the place called "The Ben Jonson" aforesaid. And whereas in truth and in fact the said alleged transactions relating to the taking of the said A. H. N. to a house in the manner above mentioned, and all the circumstances relating thereto so alleged, sworn to, and given in evidence by the said A. H. N., had no existence whatever, as she, the said A. H. N., then and there well knew, but were so alleged, sworn to, and given in evidence as aforesaid by the said A. H. N., for the purpose of unlawfully, wickedly, and maliciously causing the said W. D. falsely to be convicted on the said indictment, and for no other purpose whatsoever. And so the jurors aforesaid, upon their oath aforesaid, do say that the said A. H. N. then and there, before the said T. Q. F., Esq., and the said R. G., Esq., they then and there having such power and authority as aforesaid, to wit, at the said session of gaol delivery, on the said 12th day of May, A.D. 1851, at the parish aforesaid, in the city of London aforesaid, and within the jurisdiction of the said court, as such witness as aforesaid, upon the trial aforesaid, of her own proper act and consent, and of her own most wicked and corrupt mind, in manner and form aforesaid, falsely, knowingly, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Precedents.

No. X.
Indictment for
perjury.

No. XI.

Indictment for Perjury committed in an examination before a Commissioner of Bankrupts.

CENTRAL Criminal Court, } The jurors for our Lady the Queen,
to wit. } upon their oath present, that on the
24th day of October, in the year of Lord 1851, a petition for adjudication of the bankruptcy of one J. S. D. was under and in pursuance of the statute made and passed in the session of Parliament holden in the twelfth and thirteenth years of the reign of our Lady the Queen, intituled *An Act to amend and Consolidate the Laws relating to Bankrupts*, filed and prosecuted in the Court of Bankruptcy in London; and that the said J. S. D. afterwards, to wit, on the day aforesaid, in the year aforesaid, duly became and was declared and adjudicated to be a bankrupt, under and within the meaning of the said statute. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the proceedings upon and in respect of the said bankruptcy were depending in the said Court of Bankruptcy, to wit, on the 17th day of November, in the year 1851, J. H. came before E. H., Esq., at the Bankruptcy Court House, in Basinghall-street, in the city of London, and within the jurisdiction aforesaid, to be examined in the said Court of Bankruptcy in the matter of the said bankruptcy, by and before the said E. H., touching and concerning the trade, dealings, and estate of the said bankrupt, he the said E. H. then being a commissioner of the said Court of Bankruptcy, duly appointed and empowered to act in the matter of the said bankruptcy, and to examine the said J. H. in that behalf; and that the said J. H., then and there before the said E. H., was duly sworn, and took his corporal oath that the evidence he should give in and upon his said examination should be the truth, the whole truth, and nothing but the truth: (he the said E. H. then and there having competent power and authority to administer the said oath to the said J. H. in that behalf.) And the jurors aforesaid, upon their oath aforesaid, do further present, that at and upon the said examination of the said J. H., and at the time the said J. H. so deposed and swore as hereinafter mentioned, it then and there became, and was material in and to the matter of the said bankruptcy, to inquire what was the nature and extent of the dealings of the said J. H. with, and of his purchases from the said bankrupt, and especially of the extent and of the manner of dealing with respect to such purchases, during the months of September and October, in the year of our Lord 1851, and whether the said J. H. had, previous to the 2nd day of September, in the year aforesaid, made any purchases of goods from the said bankrupt to the extent of 10*l.* at one time; and whether certain purchases, for and in respect of which certain invoices, marked respectively B, C, D, E, F, G, H, I, K, L, and M, and produced by the said J. H. at and upon his said examination, were all the purchases, over 5*l.*, which the said J. H. had made from the said bankrupt in September, in the year aforesaid; and whether certain invoices, produced by the said J. H. at and upon his said examination, and marked respectively N, O, P, and Q, were all the invoices which the said J. H. had received from the said bankrupt in the month of October,

in the year aforesaid; and whether the purchases made by the said J. H. from the said bankrupt, in the said month of October, and for which the said J. H. did not take invoices, exceeded 15*l*.; and whether the said J. H. had ever gone with the said bankrupt to the house of a pawnbroker in Sloane-street, named C. L., to redeem goods; and whether the said J. H. had ever redeemed any deposits made by the said bankrupt to the said C. L., a pawnbroker, in Sloane-street; and whether the said J. H. had ever sold any goods which had been received or purchased by him the said bankrupt, to one B. P. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. H., being so sworn as aforesaid, did then and there, upon his said examination, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said E. H., depose and swear, amongst other things, in substance and to the effect following, that is to say, my dealings (meaning his the said J. H.'s dealings) with D. (meaning the said bankrupt), commenced in May last, but they were not then to any extent, and I (meaning the said J. H.) always took a bill of parcels when I purchased to the extent of 5*l*. or 10*l*. I keep all my bills of parcels; and all the bills of parcels I have had from D. (meaning the said bankrupt), I (meaning the said J. H.) have now with me here, but I had no bills of parcels from D. (meaning the said bankrupt), till the 2nd of September last (meaning the month of September, in the year aforesaid), as all my previous transactions with him (meaning the said bankrupt) were of a very trifling character, before the 2nd of September last (meaning the month of September, in the year aforesaid), I (meaning the said J. H.) had no one transaction with D. (meaning the said bankrupt) to the extent of 10*l*., but I may have had to the extent of about 5*l*., from the 2nd of September last. I have had invoices of all my (meaning the said J. H.) purchases and dealings with D. (meaning the said bankrupt.) I (meaning the said J. H.) do not remember going with the bankrupt (meaning the said bankrupt) to a pawnbroker's in Sloane-street, named L., to redeem goods; and I say positively that I never did go there with the bankrupt (meaning the said bankrupt). I (meaning the said J. H.) bought of him (meaning the said bankrupt) in the month of September (meaning September, in the year aforesaid), goods to the value of several hundred pounds. I produce all the invoices of my (meaning the said J. H.) purchases of him (meaning the said bankrupt) in September (meaning September aforesaid); they are marked respectively B, C, D, E, F, G, H, I, K, L, and M; those are all the purchases, over 5*l*., which I purchased of D. (meaning the said bankrupt) in September. My purchases of him under 5*l*., but of which I took no invoices, were few in number during that month. My last purchase of D., for which I took an invoice, was October 8th, 1851, and since that time I have made very trifling purchases of D. I (meaning the said J. H.) produce all my invoices of D. (meaning the said bankrupt) in the month of October (meaning the month of October, in the year aforesaid), which are marked respectively N, O, P, and Q. My dealings with D. in this month of October, for which I took invoices, amounted together to about 115*l*.; any other purchases of him (meaning the said bankrupt) in the month of October (meaning October, in the year aforesaid), for which I did not take invoices, amounted to not more than 15*l*. I (meaning the said J. H.) never did on any occasion redeem any deposits made by D. (meaning the said bankrupt) to Mr. L., a pawnbroker, in Sloane-street (meaning the said C. L.,) and that I speak positively to. I (meaning the said J. H.)

Precedents.

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never sold any of D.'s goods (meaning any goods which he the said J. H. had received or purchased from the said bankrupt) to B. P., of Castle-street, St. Mary Axe (meaning the said B. P.), whereas, in truth and in fact, the said J. H. had, previous to the said 2nd day of September, in the year aforesaid, had divers transactions with the said bankrupt, each of which transactions had been and was to a much greater extent than the sum of 10*l*. And whereas, in truth and in fact, the said J. H. had, previous to the said 2nd day of September last aforesaid, made divers purchases of goods of and from the said bankrupt, each of which said purchases had been and was to a much greater amount and extent than 10*l*. at one time; and whereas, in truth and in fact, the said purchases for and in respect of which the said invoices marked respectively B, C, D, E, F, F, G, H, I, K, L, and M, were purchased by the said J. H. at and upon his said examination, were not all the purchases above the amount of 5*l*. which he the said J. H. had made and purchased from the said bankrupt in the month of September, in the year aforesaid; and whereas, in truth and in fact, the said J. H. had, in the said month of September, made divers purchases of goods, to a greater amount than 5*l*. each purchase, from the said bankrupt, to wit, a certain purchase of five dozen silver spoons and forks, for a sum exceeding 5*l*., to wit, 20*l*.; and a certain other purchase of two gold watches, for a sum exceeding 5*l*., to wit, 15*l*., the said last-mentioned purchases being other and different from any of the said purchases in September aforesaid, the invoices for and in respect of which were so produced by the said J. H. aforesaid; and whereas, in truth and in fact, the purchases made by the said J. H. from the said bankrupt in the month of October, in the year aforesaid, and for which the said J. H. did not take invoices, greatly exceeded the sum of 15*l*., and amounted to a much larger sum, to wit, to the sum of 100*l*.; and whereas, in truth and in fact, the said J. H. did, to wit, on the 8th day of October, in the year aforesaid, go to the shop of the said C. L., in Sloane-street aforesaid, to redeem goods, and did then and there redeem of and from the said C. L. certain deposits made by the said bankrupt to and with the said C. L., as he the said J. H., at the time he so deposed and swore as aforesaid, then well knew; and whereas, in truth and in fact, the said J. H. had sold divers goods, to wit, five dozen silver spoons and forks, and four gold watches, which he the said J. H. had received from the said bankrupt to the said B. P., as he the said J. H., at the time he so deposed and swore as aforesaid, then and there well knew, against the peace of our said Lady the Queen, her crown and dignity.

Second count.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that on the 24th day of October, A. D. 1851, a petition for the adjudication of the said bankruptcy of the said J. S. D. was, under and in pursuance of the said statute, filed and prosecuted in the Court of Bankruptcy in London, and that the said J. S. D. afterwards, to wit, on the day last aforesaid, in the year last aforesaid, duly became and was declared and adjudicated to be a bankrupt, under and within the meaning of the said statute. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards and whilst the said proceedings upon and in respect of the said last-mentioned bankruptcy were depending in the said Court of Bankruptcy, to wit, on the first day of December, A. D. 1851, the said J. H. came before the said E. H., Esq., at the Bankruptcy Court House in Basinghall-street, in the city aforesaid, and within the jurisdiction aforesaid, to be examined in the said

Court of Bankruptcy, in the matter of the said bankruptcy, by and before the said E. H., touching and concerning the trade, dealings, and estate of the said bankrupt (he the said E. H. then being a commissioner of the said Court of Bankruptcy, duly appointed and empowered to act in the matter of the said bankruptcy, and to examine the said J. H. in that behalf); and that the said J. H., then and there before the said E. H., was duly sworn that the evidence which he the said J. H. should give in and upon his said examination, should be the truth, the whole truth, and nothing but the truth (he the said E. H. then and there having a competent power and authority to administer the said oath to the said J. H. in that behalf.) And the jurors aforesaid, upon their oath aforesaid, do further present, that in and upon the said last-mentioned examination of the said J. H., and at the time the said J. H. so deposed and swore as hereinafter mentioned, it then and there became and was material in and to the matter of the said bankruptcy, to inquire whether the said J. H. had ever been to the shop of a pawnbroker named C. L., in Sloane-street, or to any pawnbroker's in Sloane-street, to redeem goods pledged to the said C. L. by the said bankrupt; and whether the said J. H. had on the 21st and 23rd days of October, in the year aforesaid, respectively redeemed at the shop of one J. R. goods pledged by the said bankrupt with the said J. R.; and whether the pawnbroker's tickets for and in respect of certain goods which had been redeemed by the said J. H. at the shop of the said J. R., on the 21st and 23rd days of October, in the year aforesaid, respectively had been received by the said J. H. from the said bankrupt. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. H., being so sworn as last aforesaid, did then and there, upon his said last-mentioned examination, upon his oath last aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously depose and swear, amongst other things, in substance and to the effect following, that is to say, I (meaning the said J. H.) did not, on or about the 8th day of October last (meaning October, in the year aforesaid) accompany the bankrupt (meaning the said bankrupt) to or meet the bankrupt at L.'s, in Sloane-street (meaning the said C. L.'s), and redeem two lots of goods pledged by the bankrupt at L.'s; one lot for 10*l.*, and the other lot for 80*l.* I (meaning the said J. H.) never redeemed any lots at L.'s (meaning the said C. L.) I recollect on one occasion meeting the bankrupt (meaning the said bankrupt) near the Exhibition, in the evening, and he then asked me to accompany him somewhere in that neighbourhood, and I did so, but it was not, to my knowledge, to a pawnbroker's; the bankrupt went in at a private entrance, and the bankrupt beckoned me in, and I saw the bankrupt produce some letter or ticket, and I saw some goods handed out. I helped the bankrupt to count out his money. I then left the room, and the bankrupt, on coming out, told me he had a fine lot of goods, which he proposed to sell me. I (meaning the said J. H.) cannot say whether that was at Mr. L.'s (meaning the said C. L.'s) house. Upon that occasion I did not produce the money, and I did not myself redeem the goods. I (meaning the said J. H.) have redeemed some goods at Mr. R.'s in Shoreditch (meaning the shop of the said J. R.), but I cannot say the date or the amount, nor whose tickets they were, nor if I received the tickets from the bankrupt (meaning the said bankrupt.) I cannot say if I redeemed any goods whatever at R.'s since the 17th October last. I redeemed on two occasions at R.'s, goods belonging to the bankrupt, but those I redeemed some time in the summer with

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money supplied me by the bankrupt for the purpose, and on those occasions I delivered the goods to the bankrupt. I (meaning the said J. H.) did not, to my recollection, on the 21st October last (meaning October in the year aforesaid), redeem goods pledged for 50*l.* at R.'s, in Shore-ditch (meaning the shop of the said J. R.) The bankrupt did not give me money to redeem the goods at R.'s, which it is supposed I redeemed on the 21st and 23rd October last, but I do not recollect that I (meaning the said J. H.) did redeem any such goods about that time at R.'s. I take out a great quantity of goods, which are pledged by other persons, all over London, and I cannot recollect one transaction of that kind from another. I did not, to my knowledge, retain out of the duplicates or deposit-notes which I received from the bankrupt on the 17th October two relating to goods deposited at R.'s for two sums of 50*l.* each, nor do I recollect having retained any other of the tickets which I had of D. (meaning the said bankrupt) on the 17th October last besides those I have mentioned in my former examination. The tickets which I did retain of the bankrupt on the 17th October last, and which I have since redeemed, were as follows:—One at S.'s for 25*l.* 10*s.*; one at Mr. R. A.'s for 27*l.*; and one other at Mr. R. A.'s for 80*l.* I also retained one other deposit-note at Mr. A.'s for 100*l.* 10*s.*, which I, at the time of my last examination, handed to Mr. V. S. for the assignees. I do not recollect retaining the duplicates which I had from the bankrupt on the 17th October last any other than the four last-mentioned notes. I (meaning the said J. H.) never had of D. (meaning the said bankrupt) any other pawnbroker's tickets than those I have already stated; therefore if I (meaning the said J. H.) did redeem any goods at R.'s (meaning the shop of the said J. R.) on the 21st October last (meaning October in the year aforesaid), and on the 23rd October last I (meaning the said J. H.) had not the tickets from the bankrupt (meaning the said bankrupt.) Whereas in truth and in fact the said J. H. did, on the 8th day of October, in the year aforesaid, accompany the said bankrupt to the shop of the said C. L., in Sloane-street, and then redeemed two lots of goods pledged by the said bankrupt at the said C. L.'s, one lot for 10*l.*, and the other lot for 80*l.*, as he, the said J. H., at the time he so deposed as last aforesaid, then well knew. And whereas in truth and in fact the said J. H. did produce the money with which the said two lots of goods pledged by the said bankrupt at the said C. L.'s, in Sloane-street aforesaid, were redeemed. And whereas in truth and in fact the said J. H. did, on the 21st day of October, in the year aforesaid, redeem at the shop of the said J. R. goods pledged by the said bankrupt with the said J. R. for 50*l.*, as he, the said J. H., at the time he so deposed as in this count mentioned, then well knew. And whereas in truth and in fact the said J. H. had received the pawnbroker's ticket for and in respect of the said last-mentioned goods from the said bankrupt, as he, the said J. H., at the time he so deposed as aforesaid, well knew. And whereas in truth and in fact the said J. H. had, on the 23rd day of October, in the year aforesaid, redeemed at the shop of the said J. R. the goods pledged by the said bankrupt with the said J. R. for 50*l.*, as he, the said J. H., at the time he so deposed as last aforesaid, well knew. And whereas in truth and in fact the said J. H. had received the pawnbroker's ticket for and in respect of the said last-mentioned goods from the said bankrupt, as he, the said J. H., at the time he so deposed as last aforesaid, well knew, against the peace of our Lady the Queen her crown and dignity.

No. XII.

Indictment for Forging and Uttering a "Character Paper," with intent to defraud the Commissioners and Officers of Her Majesty's Customs.

CENTRAL Criminal Court, } The jurors for our Lady the Queen,
to wit. } upon their oath present, that J. T. S.
late of the parish of St. Margaret, in the county of Middlesex, labourer,
and A. C., of the same place, labourer, on the 2nd day of May, in the
year of our Lord 1850, at the parish aforesaid, in the county aforesaid,
and within the jurisdiction of the Central Criminal Court, unlawfully,
knowingly, deceitfully, and falsely did forge a certain paper writing, to
wit, a character paper, which said forged character paper is as follows
(that is to say): "We, the undersigned, W. S., timber merchant, York-
road, Lambeth, and N. R., lighterman, publican, Old Barge House, Christ-
church, hereby certify that we have known J. T. S., who has been
nominated a glut waterman of the Customs, in the port of London,
for the last ten years; he is a young man of good general character and
conduct, is of sober and steady habits, and respectable in his demeanour;
he has never been known, or suspected to have been concerned in any
offence against the Revenue Laws, and he has never been dismissed
from the services of the Customs or Excise, or from any other public
department; he has been brought up to the calling of waterman,
served his apprenticeship to Mr. M., and we do not know of any
impediment to his admission into the service of the Customs as glut
waterman.

"Witness to the signature of Mr. S., } W. S.
A. C. }
"Witness to the signature of Mr. R., } N. R.
P. G. }

"2nd May, 1850."

with intent to defraud and deceive and injure H. A., then an officer of the water-guard in Her Majesty's Customs, to the damage of the said H. A., to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. T. S. and A. C. afterwards, to wit, on the day and year aforesaid, and within the jurisdiction aforesaid, unlawfully, knowingly, deceitfully and falsely did forge a certain other paper writing, to wit, a certificate of the character of the said J. T. S., and having thereon the names of "W. S." and "N. R." and "P. G.," with intent to defraud, deceive and injure the Commissioners of Her Majesty's Customs, against the peace of our Lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. T. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, and within the jurisdiction aforesaid, unlawfully, knowingly, deceitfully and falsely did offer, utter,

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dispose of and put off to one G. F. S., as a true and genuine paper writing, a certain forged paper writing, which said last-mentioned forged paper writing is as follows (that is to say), [*setting out the instrument as in the first count*], with intent to defraud and injure Her Majesty's Commissioners of Customs; he the said J. T. S., at the time he so offered, altered, disposed of and put off the said last-mentioned forged paper writing as aforesaid, then and there, and within the jurisdiction aforesaid, well knowing the same to be forged, against the peace of our Lady the Queen, her crown and dignity.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. T. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, unlawfully, knowingly, deceitfully and falsely did offer, alter, dispose of and put off a certain other forged paper writing, to wit, a character paper, with intent to defraud, deceive, and injure the Commissioners of Her Majesty's Customs, he the said J. T. S., at the time he so offered, uttered, disposed of and put off the said last-mentioned forged paper writing as aforesaid, then and there, and within the jurisdiction aforesaid, well knowing the same to be forged, against the peace of our Lady the Queen, her crown and dignity.

Fifth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that before the committing of the offences hereinafter mentioned, a certain office and situation in Her Majesty's Customs, to wit, the office and situation of glut waterman, was about to become vacant, and thereupon the said J. T. S. made application for such office and situation to one H. A., then being inspector-general of the water-guard in the Customs of Her Majesty the Queen, and that thereupon and in consequence of such application as aforesaid, a certain paper writing was then delivered to the said J. T. S., which said paper writing is as follows [*setting it out as in the first count*], to the intent and in order that he the said J. T. S. should obtain the true signatures of the said W. S. and N. R., and also the signatures of two persons by whom the execution of the said paper writing might and would be duly attested; and that afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, he the said J. T. S. unlawfully, knowingly, deceitfully and falsely did forge the names and signatures of the said W. S. and N. R. to the execution of the said paper writing, and unlawfully, knowingly, deceitfully and falsely did forge the name and signature of one P. G., as attesting the due execution of the said paper writing by the said N. R., with intent to defraud and deceive and injure the Commissioners of Her Majesty's Customs; and that the said A. C., at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, did unlawfully, knowingly, deceitfully and falsely attest one of the said names and signatures, to wit, the name and signature of W. S., by writing his name, that is to say, the name of him the said A. C. as attesting witness thereto, he the said A. C. then and there well knowing the signature of the said W. S. to be forged as aforesaid, with intent to defraud, deceive and injure the Commissioners of Her Majesty's Customs, against the peace of our Lady the Queen, her crown and dignity.

Sixth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that before the committing of the offence hereinafter mentioned, a certain office and situation in Her Majesty's Customs, to wit, the office and situation of glut waterman, was about to become

vacant, and that a certain paper, to wit, a character paper, was, to wit, on the day and year aforesaid, delivered to the said J. T. S., and was then received by him, in order that he the said J. T. S. might obtain the signatures of two persons thereunto, and also the signatures of two other persons to attest the due execution of the said character paper; and that afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, and within the jurisdiction aforesaid, he the said J. T. S. wilfully, knowingly, deceitfully and falsely did forge the signatures of two persons to the said character paper, to wit, of one W. S. and of one N. B., and also unlawfully, knowingly, deceitfully and falsely did forge the signature of one P. G. as attesting witness to the execution of the said N. B., with intent to defraud certain persons to the jurors aforesaid unknown; and that the said A. C. on the day and year aforesaid, at the parish aforesaid, and within the jurisdiction aforesaid, unlawfully, knowingly, deceitfully and falsely did sign his name, that is to say, the name of the said A. C., as attesting witness to the execution of the said W. S. to the said character paper, with intent to defraud certain persons to the jurors aforesaid unknown, he the said A. C. then and there, and within the jurisdiction aforesaid, and at the time when he so wrote his name as attesting witness to the said signature as aforesaid, well knowing the said signature of the said W. S. to be forged, and then and there, and within the jurisdiction aforesaid, well knowing the said last-mentioned signature to be so forged by the said J. T. S., with intent to defraud as aforesaid, against the peace of our Lady the Queen, her crown and dignity.

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No. XIII.

Indictment for obtaining money by falsely pretending that a certain society was duly enrolled under the Friendly Societies Acts.

STAFFORDSHIRE, } The jurors of our Lady the Queen upon
to wit. } their oath present, that G. F., late of the
parish of West Bromwich, in the county of Staffordshire, labourer, on the
27th day of April, in the year of our Lord 1846, unlawfully, knowingly,
and designedly did falsely pretend to one J. B. that John Tidd Pratt,
Esq., the Barrister-at-Law for the the time being appointed to certify the
rules of the Savings Banks, had certified that the rules of a certain
Friendly Society (that is to say), a certain Sick Society, who had agreed
to meet at the house of the said J. B., the sign of the Forge Tavern,
Union-street, Spon-lane, West Bromwich, in the county of Stafford,
were in conformity to law, and with the provisions of the act of Geo. 4,
c. 56, as amended by the act 4 & 5 Will. 4. c. 40, and that he the said
G. F. had paid to the said John Tidd Pratt the sum of one guinea for
such certificate, by means of which said several false pretences the said
G. F. did then unlawfully obtain from the said J. B. the sum of one
guinea, of lawful money of Great Britain, of the moneys of the said

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false
pretences.

J. B., with intent thereby to defraud; whereas in truth and in fact the said John Tidd Pratt had not certified that the rules of the said society were in conformity to law, and with the provisions of the said act 15 Geo. 4, c. 56, as amended by the act 4 & 5 Will. 4, c. 40, as he the said G. F. then well knew: and whereas in truth and in fact the said rules had not at any time been submitted to the said John Tidd Pratt for the purpose of his so certifying as aforesaid, as he the said G. F. then well knew: and whereas in truth and in fact the said G. F. had not paid to the said John Tidd Pratt the sum of one guinea, or any sum of money whatsoever, for such certificate as aforesaid, to the great damage and deception of the said J. B., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said G. F., on the day and year aforesaid, unlawfully, knowingly, and designedly did falsely pretend to one J. B. that John Tidd Pratt, Esq., Barrister-at-Law for the time being appointed to certify the rules of the Savings Banks, had certified that the rules of a certain Friendly Society (that is to say), a certain Sick Society, who had agreed to meet at the house of the said J. B., the sign of the Forge Tavern, Union-street, Spon-lane, West Bromwich, in the county of Stafford, were in conformity to law, and with the provisions of the act 10 Geo. 4, c. 56, as amended by the act 4 & 5 Will. 4, c. 40, and that he the said G. F. had paid to the said John Tidd Pratt the sum of one guinea for such certificate as last aforesaid; by means of which said several last-mentioned false pretences the said G. F. did then unlawfully obtain from the said J. B. the sum of one guinea, of lawful money of Great Britain, of the moneys of the said J. B., with intent thereby to defraud: whereas in truth and in fact the said John Tidd Pratt had not certified that the rules of the said society were in conformity to law, and with the provisions of the said act 10 Geo. 4, c. 56, as amended by the act 4 & 5 Will. 4, c. 40, as he the said G. F. then well knew: and whereas in truth and in fact the said rules had not at any time been submitted to the said John Tidd Pratt for the purpose of his so certifying as aforesaid, as he the said G. F. then well knew: and whereas in truth and fact the said G. F. had not paid to the said John Tidd Pratt the sum of one guinea, or any sum of money whatsoever, for such certificate as aforesaid, to the great damage and deception of the said J. B., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said G. F. on the day and year aforesaid, unlawfully, knowingly, and designedly did falsely pretend to one J. B. that John Tidd Pratt, Esq., the Barrister-at-Law for the time being appointed to certify the rules of the Savings Banks, had certified that the rules of a certain Friendly Society (that is to say), a certain Sick Society, who had agreed to meet at the house of the said J. B., the sign of the Forge Tavern, Union-street, Spon-lane, West Bromwich, in the county of Stafford, were in conformity to law, and with the provisions of the act 10 Geo. 4, c. 56, as amended by the act 4 & 5 Will. 4 c. 40, and that he the said G. F. had paid to the said John Tidd Pratt the sum of one guinea for such certificate, by means of which said

several last-mentioned false pretences the said G. F. did then unlawfully obtain from the said J. B. the sum of one guinea, of lawful money of Great Britain, of the moneys of J. S. and others, with the intent thereby to defraud: whereas in truth and in fact the said John Tidd Pratt had not certified that the rules of the said society were in conformity to law, and with the provisions of the said act 10 Geo. 4, c. 56, as amended by the act 4 & 5 Will. 4, c. 40, as he the said G. F. then well knew: and whereas in truth and in fact the said rules had not at any time been submitted to the said John Tidd Pratt for the purpose of his so certifying as aforesaid, as he the said G. F. then well knew: and whereas in truth and in fact the said G. F. had not paid to the said John Tidd Pratt the sum of one guinea, or any sum of money whatsoever, for such certificate as aforesaid, to the great damage and deception of the said J. B., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

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Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said G. F., on the day and year aforesaid, unlawfully, knowingly and designedly did falsely pretend to one J. B. that John Tidd Pratt, Esq., the Barrister-at-Law for the time being appointed to certify the rules of the Savings Banks, had certified that the rules of a certain Friendly Society (that is to say), a certain Sick Society, who had agreed to meet at the house of the said J. B., the sign of the Forge Tavern, Union-street, Spon-lane, West Bromwich, in the county of Stafford, were in conformity to law, and with the provisions of the act 10 Geo. 4, c. 56, as amended by the act 4 & 5 Will. 4, c. 40, and that he the said G. F. had paid to the said John Tidd Pratt the sum of one guinea for such certificate as last aforesaid; by means of which said several last-mentioned false pretences the said G. F. did then unlawfully obtain from the said J. B. the sum of one guinea, of lawful money of Great Britain, of the moneys of J. S. and others, with intent thereby to defraud: whereas in truth and in fact the said John Tidd Pratt had not certified that the rules of the said society were in conformity to law, and with the provisions of the said act 10 Geo. 4, c. 56, as amended by the act 4 & 5 Will. 4, c. 40, as he the said G. F. then well knew: and whereas in truth and in fact the said rules had not at any time been submitted to the said John Tidd Pratt for the purpose of his so certifying as aforesaid, as he the said G. F. then well knew: and whereas in truth and in fact the said G. F. had not paid to the said John Tidd Pratt the sum of one guinea, or any sum of money whatsoever, for such certificate as aforesaid, to the great damage and deception of the said J. B., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

No. XIV.

*Indictment for receiving more than one lunatic into an unlicensed house,
contrary to the statute 8 & 9 Vict. c. 100.*

STAFFORDSHIRE, } The jurors for our Lady the Queen upon
to wit. } their oath present, that heretofore and after
the passing of an act of Parliament made and passed in the ninth year
of the reign of Her Majesty Queen Victoria, intituled *An Act for the
Regulation of the Care and Treatment of Lunatics*, to wit, on the 20th
day of October, A.D. 1851, A. M. unlawfully and wilfully did receive
into a certain house, not being an asylum or an hospital registered under
the said act, or a house duly licensed under the said act, or under any of
the acts therein mentioned and thereby repealed, two and more lunatics,
that is to say, one H. S., one M. S., one C. B., one J. D., one E. D.,
and one E. B., against the form of the statute in such case made and
provided, and against the peace of our Lady the Queen, her crown and
dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid,
do further present, that heretofore and after the passing of the said first-
mentioned act of Parliament, the said A. M. had received into a certain
house not being an asylum or an hospital registered under the said act,
or a house duly licensed under the said act, or under any of the acts
therein mentioned and thereby repealed, a certain lunatic (that is to say),
one H. S., and that the said A. M. afterwards, and after the passing of
the said act, and whilst the said H. S. was and continued in the said
house, and whilst the said H. S. was and continued a lunatic, to wit, on
the 20th day of October, A.D. 1851, unlawfully and wilfully did receive
into the said house, the same not then being an asylum or an hospital
registered under the said act, or a house duly licensed as aforesaid, a
certain other lunatic (that is to say), one E. B., against the form of the
statute in such case made and provided, and against the peace of our
Lady the Queen, her crown and dignity.

No. XV.

*Indictment for Perjury, committed in an Affidavit sworn before the Clerk of
Appearances, in the Exchequer, in the course of a Suit in that Court.*

CENTRAL Criminal Court, } The jurors of our Lady the Queen,
to wit. } upon their oath present, that heretofore
and before the commission of the offence hereinafter mentioned, a cer-
tain action had been commenced in the Court of Exchequer of our said
Lady the Queen, at Westminster, in which said action one R. H. C. was

the plaintiff, and one J. S. M. was the defendant. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the issuing of the writ of summons in the said action, and whilst the said action was pending, to wit, on the 16th July, A.D. 1851, at the parish of St. Andrew, Holborn, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, the said R. H. C., late of the parish aforesaid, in the county aforesaid, labourer, came, in his own proper person, before W. P., gentleman, then being the Clerk of Appearances of the said Court of Exchequer, and then and there produced a certain affidavit of him the said R. H. C., intitled in the said action, and was then and there, and before the said W. P., in due form of law sworn, and did take his corporal oath upon the Holy Gospel of God, touching and concerning the truth of the matters contained in his said affidavit, he the said W. P. then having competent and sufficient power and authority to administer the said oath to the said R. H. C.

Precedents.
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No. XV.
Indictment for
perjury.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. H. C. being so sworn as aforesaid, it then and there became and was a material question and subject of inquiry in the said action, whether the said J. S. M. had been personally served with a true copy of the said writ of summons in the said action, and whether on the 8th day of July, A.D. 1851, and whether by him the said R. H. C.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. H. C., being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, and wickedly and maliciously devising and intending to injure and aggrieve the said J. S. M., and to subject him to the payment of divers heavy costs, charges and expenses, then and there, upon his oath aforesaid, before the said W. P., in and by the said affidavit of him the said R. H. C., unlawfully, falsely, knowingly, wilfully, maliciously and corruptly did say, depose and swear, in substance and to the effect following: (that is to say), that he the said R. H. C. did, on Thursday, the 8th day of July, A.D. 1851, personally serve the said J. S. M. with a true copy of a writ of summons, which appeared to him the said R. H. C. to have been regularly issued out of and under the seal of the said Court of Exchequer, against the said J. S. M., at the suit of the said R. H. C. (meaning the said writ of summons in the said action); whereas in truth and in fact the said R. H. C. did not on the said 8th day of July, A.D. 1851, or at any other time, personally serve the said J. S. M. with a true copy of the said writ of summons in the said action (or any writ of summons whatever), as he the said R. H. C., at the time he so said, deposed and swore as aforesaid, well knew.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said R. H. C., of his own act and consent, and of his own most wicked and corrupt mind, on the said 16th day of July, in the year aforesaid, in the parish aforesaid, and within the jurisdiction of the said Court, in and by his said affidavit before the said W. P., he the said W. P. then and there having a competent and sufficient lawful power and authority to administer the said oath to the said R. H. C. in that behalf, unlawfully, falsely, knowingly, wilfully, maliciously and corruptly did commit wilful and corrupt perjury, against the peace of our said Lady the Queen, her crown and dignity.

No. XVI.

Indictment under the 5 & 6 Will. 4, c. 62, for making a False Declaration before the Clerk of the Affidavits, in Chancery, that certain Property, in which the Defendant had an interest was unincumbered.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that before and
at the time of the committing the offence hereinafter next mentioned,
one J. P. had lent and advanced to R. H. C., who then was indebted to
the said J. P., divers sums of money, amounting, to wit, to the sum of
310*l.*; and that the said R. H. C. had, before and at the time of the
committing of the offence hereinafter next mentioned, made and executed
to the said J. P. a certain deed of assignment of his the said R. H. C.'s
reversionary interest in his the said R. H. C.'s share in a certain large
sum of money, to wit, the sum of 4,000*l.* Three per Cent. Annuities,
theretofore left and bequeathed by S. O., of Ludlow, in the county of
Salop, then deceased, by her last will, dated the 16th day of October, in
the year of our Lord 1824, to her nephew, B. C., the father of the said
R. H. C., and after the decease of the said R. C., to be equally divided
between the children of him the said R. C., share and share alike, as and
for a security for the repayment by the said R. H. C. of the said sums of
money to the said J. P., and had represented to the said J. P. that his
the said R. H. C.'s debts and liabilities were and amounted to a very
trifling sum. And the jurors aforesaid, upon their oath aforesaid, do
further present, that before and at the time of the committing of the
offence hereinafter next mentioned, the said J. P. had required and
requested of the said R. H. C., that, for the assurance and satisfaction of
the said J. P., and for the purpose of enabling the said J. P. to judge of
the pecuniary circumstances of the said R. H. C., and of his probable
capability to repay the said sums of money so lent and advanced as afore-
said, and to ascertain whether the said reversionary interest of the said
R. H. C., so assigned as aforesaid, or any part thereof, had been or was
previously charged or incumbered in any way, he the said R. H. C. should
and would make a solemn declaration, under and in pursuance of the
statute made and passed in a session of Parliament holden in the fifth
and sixth years of the reign of His late Majesty King William the
Fourth, intituled *An Act to repeal an Act of the present Session of
Parliament, intituled "An Act for the more effectual Abolition of Oaths
and Affirmations taken and made in various Departments of the State,
and to substitute Declarations in lieu thereof, and for the more entire
Suppression of voluntary and extra-judicial Oaths and Affidavits, and
to make other provisions for the Abolition of unnecessary Oaths,"* whether
he the said R. H. C. had created any, and what, charges upon his said
reversionary interest, and as to the then pecuniary circumstances of the
said R. H. C. And the jurors aforesaid, upon their oath aforesaid, do
further present, that, afterwards, to wit, on the 29th day of May, in the
year of our Lord 1851, the said B. H. C., in pursuance of the said requi-
sition and request of the said J. P., and for the purpose of inducing the

said J. P. to forbear from pressing the said R. H. C. for and insisting on the immediate repayment by the said R. H. C. of the said sums of money so lent and advanced by the said J. P. to the said R. H. C. as aforesaid, and to induce the said J. P. to forbear from giving notice to the executors of the said S. O. of the said assignment of the said reversionary interest of the said R. H. C., as a security for the repayment of the said last-mentioned sums of money, and for the ostensible and pretended purpose of enabling the said J. P. to ascertain and judge of the pecuniary circumstances of him the said R. H. C., and of his capability to repay the said last-mentioned sums of money, and for the purpose of confirming the said deed of assignment, went before one H. M., Esquire, at the Chancery Affidavit Office, in Southampton Buildings, in the county of Middlesex, and within the jurisdiction of the said court, he the said H. M. then and there being an assistant clerk to the Clerk of the Affidavits, at the Chancery Affidavit Office aforesaid, duly appointed for taking affidavits and declarations, under and in pursuance of the said statute, and then and there having competent power and authority to take and receive the declaration hereinafter next mentioned to have been made by the said R. H. C.; and that the said R. H. C. did then and there, and within the jurisdiction of the said court, before the said H. M., produce a certain declaration, in writing, of him the said R. H. C., and then and there falsely, wilfully, maliciously, corruptly, fraudulently, and voluntarily, did make and subscribe the said declaration, in writing, before the said H. M., Esquire, then being such assistant clerk as aforesaid, according to the form in the schedule annexed to the said statute, he the said H. M., Esquire, then and there having competent power and authority as aforesaid to take and receive the said last-mentioned declaration. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. H. C., by his said declaration, so then and there made and subscribed by him as last aforesaid, falsely, wilfully, maliciously, corruptly, fraudulently, and voluntarily, did solemnly declare, amongst other things, before the said H. M. Esquire, then and there having such competent authority as aforesaid, in substance and to the effect following: (that is to say), I (meaning the said R. H. C.) further solemnly and sincerely declare that I (meaning the said R. H. C.) have never in any manner heretofore mortgaged, assigned, or encumbered my (meaning his the said R. H. C.'s) reversionary interest in the said 4,000*l.*, Three per Cent. Annuities (meaning the said sum of 4,000*l.*, Three per Cent. Annuities, hereinbefore mentioned), or any part thereof. And I (meaning the said R. H. C.) also declare that I (meaning the said R. H. C.) have never been a party to any deed or instrument whereby my interest in the said stock (meaning the said 4,000*l.*, Three per Cent. Annuities) has or could have been in any manner affected. And I (meaning the said R. H. C.) further solemnly and sincerely declare that I (meaning the said R. H. C.) am not liable on any deed or instrument as surety for any person whomsoever. And I (meaning the said R. H. C.) further solemnly and sincerely declare that I (meaning the said R. H. C.) have not borrowed any money whatever, either by getting bills discounted, or otherwise, except from Mr. J. P. meaning the said J. P. hereinbefore mentioned.) And I (meaning the said R. H. C.) further solemnly and sincerely declare that I do not owe, nor am I (meaning the said R. H. C.) liable for a greater amount of debts, exclusive of the debt due to the said J. P. (310*l.*), than the sum of 250*l.*, and I (meaning the said R. H. C.) make this solemn declaration (meaning the

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said declaration so made and subscribed by the said R. H. C. as aforesaid), conscientiously believing the same to be true, and by virtue of the provisions of the said statute; whereas in truth and in fact the said reversionary interest of the said R. H. C. in his share of the said sum of 4,000*l.* Three per Cent. Annuities, had been and was at the said time when he so made the said declaration, and so solemnly declared as aforesaid, charged and mortgaged by him the said R. H. C. as a security for the repayment of a large sum of money, to wit, 800*l.*, and whereas in truth and in fact the said reversionary interest had been and was then subject to and charged with a certain mortgage and assignment, which had been before then made and executed by the said R. H. C. to one R. S. H. H. to secure the repayment of a large sum of money, to wit, the sum of 500*l.*, on the 1st day of November, 1844, as he the said R. H. C., at the time he so declared as aforesaid, then and there well knew; and whereas in truth and in fact the said reversionary interest had been and was, before and at the time of making the said declaration, and at the time the said R. H. C. so declared as aforesaid, mortgaged by the said R. H. C. to one J. J., under and by virtue of a deed of mortgage and assignment before then executed by the said R. H. C. to secure the repayment of a large sum of money, to wit, 300*l.*, on the 25th day of October, 1849, as he the said R. H. C. then well knew; and whereas in truth and in fact before and at the time of making the said declaration, and when the said R. H. C. so declared as aforesaid, the said R. H. C. then was liable as surety to a large amount, to wit, to the amount of 5,000*l.*, for one M. S., under and by virtue of a certain deed before then executed by the said R. H. C., whereby the said R. H. C. bound himself as surety to the sheriff of Middlesex for the said M. S., as he the said R. H. C. then well knew; and whereas in truth and in fact before and at the time of making the said declaration, and when the said R. H. C. so declared as aforesaid, the said R. H. C. then was liable as surety to a large amount, to wit, to the amount of 5,000*l.*, for one E. J., under and by virtue of a certain deed before then executed by the said R. H. C., whereby the said R. H. C. bound himself to the sheriff of Middlesex for the said E. J., as he the said R. H. C. then well knew; and whereas in truth and in fact the said R. H. C. then was liable for, and then owed debts, exclusive of the said debt of 310*l.* due to the said J. P., to a much larger and greater amount than the said sum of 250*l.*, to wit, to the amount of 1,000*l.*, to wit, to one B. C., as he the said R. H. C., when he so declared as aforesaid, then well knew; and so the jurors aforesaid, upon their oath aforesaid, do say that the said R. H. C. did, within the jurisdiction of the Central Criminal Court, falsely, wilfully, and corruptly make and subscribe the said declaration, in manner and form aforesaid, well knowing the same to be false and untrue, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing the offence hereinafter next mentioned, the said J. P. had lent and advanced to the said R. H. C., and then was indebted to the said J. P. in divers sums of money, together amounting, to wit, to the sum of 518*l.*, and that before the committing of the offence hereinafter next mentioned, the said R. H. C. had made and executed to the said J. P. a certain deed of assignment of his said R. H. C.'s reversionary interest in his the

said B. H. C.'s share in a certain large sum of money, to wit, the sum of 4,000*l.*, Three per Cent. Annuities, theretofore left and bequeathed by S. O., of Ludlow, in the county of Salop, then deceased, by her last will, dated the 16th day of October, in the year of our Lord 1824, to her nephew, R. C., father of the said R. H. C., and after the decease of the said R. C., to be equally divided between the children of him the said R. C., share and share alike, and also a certain legacy of 500*l.*, Three Pounds per cent. Consolidated Annuities, to which said legacy the said R. H. C. was entitled, under the will of one J. B. C., then deceased, as and for a security for the repayment by the said R. H. C. of the said sums of money so lent and advanced as in this count mentioned to the said J. P., and had represented to the said J. P. that his the said R. H. C.'s debts and liabilities amounted to a very trifling sum, and that he the said R. H. C. had not in any way charged or encumbered his said reversionary interest, and that the said legacy of 500*l.* had not been satisfied. And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of committing of the offence herein-after next mentioned, the said J. P. had required and requested of the said R. H. C. that, for the assurance and satisfaction of him the said J. P., and for the purpose of enabling the said J. P. to judge of the pecuniary circumstances of the said R. H. C., and of his probable capability to repay the said sums of money, so lent and advanced as last aforesaid, and to induce the said J. P. to forbear from giving notice or information of the said assignment of his the said R. H. C.'s said reversionary interest to the executors of the said S. O., deceased, and to satisfy the said J. P. that the said reversionary interest of the said R. H. C. had not, nor had any part thereof, been previously encumbered in any way, and that the said legacy had not been previously satisfied or paid to the said R. H. C., he the said R. H. C. should and would make a solemn declaration, under and in pursuance of the said statute, whether he the said R. H. C. had created any and what charge upon his said reversionary interest, and as to the pecuniary circumstances of the said R. H. C., and his means of repaying the said sums so lent and advanced to him as in this count mentioned. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the 15th day of October, in the year of our Lord 1851, the said R. H. C., in pursuance of the said requisition and request of the said J. P., and for the purpose of inducing the said J. P. to forbear from pressing the said R. H. C. for and insisting on the immediate repayment by the said R. H. C. of the said sums of money so lent and advanced by the said J. P. to the said R. H. C. as last aforesaid, and to satisfy the said J. P. that he the said R. H. C. had not previously charged his said reversion, and that the said legacy had not been satisfied or paid, and to induce the said J. P. to forbear from giving notice to the executors of the said S. O. of the said assignment of his the said R. H. C.'s reversionary interest, as in this count mentioned, as a security for the repayment of the said last-mentioned sums of money, and for the ostensible and pretended purpose of enabling the said J. P. to ascertain and judge of the pecuniary circumstances of him the said R. H. C., and of his capability to repay the said last mentioned sums of money, and for the purpose of confirming the said deed of assignment hereinbefore in this count firstly above mentioned, went before one J. J., Esquire, at the Chancery Affidavit Office aforesaid, and within the jurisdiction aforesaid, he the said J. J. then and there being the Clerk of the Affidavits at the

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Chancery.

Chancery Affidavit Office, and then and there having competent power and authority to take and receive the declaration hereinafter next mentioned to have been made and declared by the said R. H. C., and that the said R. H. C. did then and there, within the jurisdiction of the said court, before the said J. J., produce a certain other declaration, in writing, of him the said R. H. C., and then falsely, wilfully, maliciously, corruptly, fraudulently and voluntarily did make and subscribe the said last-mentioned declaration, in writing, before the said J. J., then being such clerk as aforesaid, according to the form in the schedule annexed to the said statute, he the said J. J. then and there having competent power and authority as aforesaid to take and receive the said last-mentioned declaration. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. H. C., by his said last-mentioned declaration, so then and there made and subscribed by him as last aforesaid, falsely, wilfully, maliciously, corruptly, fraudulently, and voluntarily did solemnly declare, amongst other things, before the said J. J., then and there having such competent authority as aforesaid, amongst other things, in substance and to the effect following: (that is to say, I (meaning the said R. H. C.) further solemnly and sincerely declare that, under the will of the said J. B. C., now deceased (meaning the said J. B. C. hereinbefore mentioned), which will is dated the 23rd day of December, 1850, and was, on or about the 5th day of August last, proved in the said Prerogative Court by the executors named in such will, I (meaning the said R. H. C.) am entitled to a legacy of 500*l.*, Three Pounds per Cent. Consolidated Annuities. And I (meaning the said R. H. C.) further solemnly and sincerely declare that I (meaning the said R. H. C.) did on the 25th day of July last, obtain judgment in Her Majesty's Court of Exchequer of Pleas against J. S. M., of Granville-square, in the County of Middlesex, in an action of debt for the sum of 28*l.* 14*s.* 1*d.*, debt and costs of suit, and no part of the same legacy (meaning the said legacy of 500*l.*, Three per Cent. Consolidated Annuities hereinbefore mentioned) and sum respectively has as yet been satisfied. And I (meaning the said R. H. C.) further solemnly and sincerely declare that I (meaning the said R. H. C.) have never in any manner sold, mortgaged, assigned, or encumbered my (meaning his the said R. H. C.'s) reversionary interest in the said 4,000*l.*, Three per Cent. Annuities (meaning the said 4,000*l.*, Three per Cent. Consolidated Annuities hereinbefore in this court mentioned), or any part thereof, or the said legacy of 500*l.*, Three Pounds per Cent. Consolidated Annuities (meaning the said legacy of 500*l.*, Three per Cent. Consolidated Annuities hereinbefore mentioned), except so far as the said reversionary interest (meaning the said interest in the said 4,000*l.*, Three per Cent. Consolidated Annuities hereinbefore in this court mentioned) is affected by certain deeds, dated respectively the 29th day of May, 1851, and the 13th day of October, 1851, and made respectively between myself (meaning the said R. H. C.), of the one part, and J. P. meaning the said J. P.) of the other part. And I (meaning the said R. H. C.) also declare that I (meaning the said R. H. C.) have never been a party to any deed or instrument whereby my interest in the said stocks or judgment-debt and costs has or could have been in any manner affected, excepting the said deed of the 29th day of May last (meaning the said deed of the 29th May last hereinbefore mentioned). And I (meaning the said R. H. C.) further solemnly and sincerely declare that I (meaning the said R. H. C.) am not liable

on any deed or instrument as surety for any person whomsoever. And I (meaning the said B.H.C.) further solemnly and sincerely declare that I (meaning the said B. H. C.) have not borrowed any money whatever, either by getting bills discounted or otherwise, except from Mr. J. P., hereinafter mentioned (meaning the said Mr. J. P. hereinbefore mentioned,) And I (meaning the said B. H. C.) further solemnly and sincerely declare that I (meaning the said B. H. C.) do not owe, nor am I (meaning the said B. H. C.) liable for a greater amount of debts, exclusive of the debt due to Mr. J. P. (meaning the said Mr. J. P. hereinbefore mentioned), and which debt (518*l.*) is secured by an assignment (meaning the said assignment hereinbefore in this count mentioned) of my (meaning the said B. H. C.'s) interest in the said stocks or sums of 4,000*l.* and 500*l.*, and the said judgment-debt, than the sum of 250*l.*, or thereabouts; and I (meaning the said B. H. C.) make this solemn declaration (meaning the said declaration so made and subscribed by the said B. H. C. as last aforesaid), conscientiously believing the same to be true, and by virtue of the provisions of the said statute, whereas, in truth and in fact, the said legacy of 500*l.*, Three per Cent. Consolidated Annuities, had been and was at the said time when he the said B. H. C. so made the said last-mentioned declaration, and so solemnly declared as last aforesaid, satisfied and paid to him the said B. H. C., and whereas in truth and in fact the said reversionary interest of the said B. H. C. in his share of the said sum of 4,000*l.* in this count mentioned, had been and was at the time the said B. H. C. so declared as in this count mentioned, charged and mortgaged by him the said B. H. C. as a security for a large sum of money, to wit, 1,000*l.*, otherwise than by the said deeds, dated respectively the 29th day of May, 1851, and the 13th day of October, 1851, and made respectively between the said B. H. C. of the one part, and the said J. P. of the other part; and whereas in truth and in fact the said reversionary interest last aforesaid had been and was, at the time the said B. H. C. so declared as last aforesaid, encumbered, he the said B. H. C. having theretofore made and executed certain mortgage deeds to the said R. S. H. H. and J. J., to secure the repayment of large sums of money, to wit, the sum of 500*l.* and 300*l.*, and which said last-mentioned deeds were deeds other than and different from the said deeds dated respectively the 29th May, 1851, and the 13th day of October, 1851, and made between the said B. H. C. and the said J. P. as aforesaid, and other than and different from any deed made with the said J. P., or in which the said J. P. had any interest whatever, as he the said B. H. C., at the time he so declared as last aforesaid, then well knew. And whereas in truth and in fact the said B. H. C. at the time he so declared as in this count mentioned, did owe and then was liable for a much larger amount of debts than the sum of 250*l.*, exclusive of the said debt of 518*l.*, due to the said J. P., to wit, to the amount of 1,000*l.*, as he the said B. H. C. then well knew; and whereas, in truth and in fact, the said B. H. C. then owed and was indebted to a larger amount, to wit, to the amount of 1,000*l.*, to wit, to one B. C., as he the said B. H. C. then well knew, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Precedents.

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No. XVI.
Indictment for
making false
declaration
before clerk of
affidavits, in
Chancery.

No. XVII.

Indictment for obtaining Money by falsely pretending that certain Property of the Defendant was unencumbered, and that he himself was free from Debts and Liabilities.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit } upon their oath present, that before
the commission of the offence hereinafter mentioned, one R. H. C. was
possessed of, and entitled to, a certain reversionary interest, to wit, a
certain reversionary interest of and in and to one-third of a certain sum
of 4,000*l.*, Three per Cent. Annuities, expectant on the death of one
R. C., and that the said R. H. C., before the commission of the offence
hereinafter mentioned, to wit, on the 1st day of November, 1844, duly
executed a certain mortgage of the said reversionary interest to one
R. S. H. H., as and for and by way of security to the said R. S. H. H., for
the repayment to him of a certain sum of money, to wit, the sum of 500*l.*
and interest, and that the said R. H. C., afterwards, and before the
commission of the said offence, to wit, on the 25th day of October, 1849,
charged the said reversionary interest, to which he was so entitled as
aforesaid, with the payment of a certain other sum of money, to wit, the sum
of 300*l.* and interest. And the jurors aforesaid, upon their oath aforesaid, do
further present, that the said R. H. C., late of the parish of Saint Pancras,
in the county of Middlesex, well knowing the premises, and being an evil-
disposed person, and contriving and intending to cheat and defraud, on the
13th day of March, in the year of our Lord 1851, at the parish aforesaid,
and within the jurisdiction of the said court, did apply to and request
one J. P. to advance and lend to him, the said R. H. C., a certain sum
of money, to wit, the sum of 50*l.*, and did then and there unlawfully
and knowingly falsely pretend to the said J. P. that he the said R. H. C.
had not then encumbered his said reversionary interest, and that he the
said R. H. C. had not borrowed any money from any other person on the
security of the said reversionary interest of him the said R. H. C.; by
means of which said false pretences, the said R. H. C. did then and there
unlawfully, knowingly, and designedly, fraudulently obtain of and from
the said J. P. one order for the payment of money, to wit, for the pay-
ment and of the value of 50*l.*, and one piece of paper, of the value of
one farthing, and the sum of 50*l.* in money, of the property, goods,
chattels, and moneys of the said J. P., with intent to cheat and defraud
him of the same; whereas, in truth and in fact, the said R. H. C., at
the time he so falsely presented as aforesaid, had encumbered, and well
knew that he had encumbered his said reversionary interest; and
whereas, in truth and in fact, the said R. H. C., at the time he so falsely
pretended as aforesaid, had borrowed, and well knew that he had bor-
rowed, certain money from certain persons, other than the said J. P.,
upon the security of the said reversionary interest, to wit, the said sum
of 500*l.*, of and from the said R. S. H. H., and the said other sum of
300*l.* of and from one J. J., against the form of the statute in such case
made and provided, and against the peace of our said Lady the Queen,
her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid,
do further present, that the said R. H. C., being possessed of and entitled
to a reversionary interest in a certain sum of 4,000*l.*, Three per Cent.

Annuities, expectant upon the decease of one R. C., did apply to and request the said J. P. to advance and lend money to him the said R. H. C., to wit, on the 31st day of May, in the year of our Lord 1851, at the parish aforesaid, and within the jurisdiction of the said court, and did then and there unlawfully, knowingly and designedly, falsely pretend to the said J. P. that he the said R. H. C. had never in any manner theretofore mortgaged, assigned, or encumbered his reversionary interest in the said 4,000*l.*, Three per Cent. Annuities, or any part thereof; that he the said R. H. C. had never been a party to any deed or instrument whereby his interest in the said stock had or could have been in any manner affected; that he the said R. H. C. was not then liable on any deed or instrument as surety for any person whomsoever; that he the said R. H. C. had not then borrowed any money whatsoever, except from the said J. P., and that he the said R. H. C. did not then owe, and was not then liable for a greater amount of debts (exclusive of a sum of 310*l.*, which he then owed to the said J. P.) than the sum of 250*l.*; by means of which said false pretences in this count mentioned, the said R. H. C. did then and there unlawfully, knowingly and designedly, fraudulently obtain of and from the said J. P. one order for the payment of money, to wit, for the payment and of the value of the sum of 6*l.* and one piece of paper, of the value of one farthing, and the sum of 6*l.* in money, of the property, goods, chattels, and moneys of the said J. P., with intent to cheat and defraud him of the same; whereas, in truth and in fact, at the time the said R. H. C. so falsely pretended as last aforesaid, he had mortgaged, assigned, and encumbered his said reversionary interest in the said sum of 4,000*l.*, Three per Cent. Annuities, to wit, the said R. S. H. H. and J. J., for the purpose of securing to them respectively the repayment of the said sums of 500*l.* and 300*l.* hereinbefore mentioned; and whereas, in truth and in fact, at the time the said R. H. C. so falsely pretended as last aforesaid, he the said R. H. C. had been, and then was, a party to certain deeds, by which his said reversionary interest in the said sum of 4,000*l.* had been and was then affected, to wit, the said deeds, by which the repayment of the said sums of 500*l.* and 300*l.* was charged upon his said reversionary interest; and whereas, in truth and in fact, at the time the said R. H. C. so falsely pretended as in this count aforesaid, he the said R. H. C. was liable on certain bonds as surety for certain purposes, to wit, one M. S. and one E. J., to wit, in two several sums of 5,000*l.*, and whereas, in truth and in fact, at the time he the said R. H. C. so falsely pretended as in this count mentioned, he the said R. H. C. had borrowed certain sums of money from certain persons other than the said J. P., to wit, the sum of 500*l.* from the said R. S. H. H., and the sum of 300*l.* from the said J. J.; and whereas, in truth and in fact, at the time the said R. H. C. so falsely pretended as aforesaid, he the said R. H. C. did owe, and was then liable, for a greater amount of debts than the sum of 250*l.* exclusive of any money which he then owed to said J. P., that is to say, the said R. H. C. then owed to the said R. S. H. H. a greater sum of money than the sum of 250*l.*, to wit, the sum of 500*l.*; and the said R. H. C. then owed to the said J. J. a greater sum of money than the said sum of 250*l.*, to wit, the sum of 300*l.*, all which said several premises he the said R. H. C., at the time he so falsely pretended as aforesaid, well knew, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Precedents.

No. XVII.

Indictment for
obtaining
money by
false
pretences.

No. XVIII.

Indictment for attempting to commit suicide.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that Marian,
the wife of Henry Thomas Johnson, late of the parish of St. Mary-le-
bow, in London, and within the jurisdiction of the said court, not having
the fear of God before her eyes, and being moved and seduced by the
instigation of the devil, heretofore, to wit, on the 18th day of July, A. D.
1851, with force and arms, at the parish aforesaid, in the county afore-
said, unlawfully and wilfully did cast and throw herself from and off a
certain steamboat called *The Bee*, then and there being propelled along
the waters of a certain river there, called the Thames, into the waters of
the said river, with the wicked intent and purpose of then and there
feloniously, wilfully, and of her malice aforethought, choking, suffocating,
drowning and murdering herself in and by the waters aforesaid, and so
the jurors aforesaid, upon their oath aforesaid, do say that the said M. J.,
on the day and year aforesaid, at the parish aforesaid, in London afore-
said, and within the jurisdiction of the said Central Criminal Court,
unlawfully, wilfully, and wickedly did attempt and endeavour feloniously,
wilfully, and of her malice aforethought, to kill and murder herself in
manner aforesaid, to the great displeasure of Almighty God, in contempt
of our said Lady the Queen and her laws, to the evil and pernicious
example of all other persons in the like case offending, and against the
peace of our said Lady the Queen, her crown and dignity.

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A. B. and C. D. were indicted for having a pistol in their possession on a certain day within a proclaimed district:

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Held, that evidence of the publication of the proclamation in "*The Dublin Gazette*" was sufficient under the 11 Vict. c. 2, s. 9. without proving the posting of the proclamation within the district.

Held, also, that though the indictment charged the offence to be under the 11 & 12 Vict. c. 2, which was a temporary Act, expiring in August, 1850, yet that the indictment concluding *contra formam statutorum*, and the statute 11 Vict. c. 2, having been continued till December, 1851, by the statute 13 & 14 Vict. c. 106, the indictment was well enough, without specially referring to the latter statute.

Held, also, that though the prisoners were jointly indicted for having a pistol in their possession, yet the jury might, after the acquittal of one of them, find the other guilty. *Reg. v. Noy*, 281

ARSENIC.

Statute to regulate sale of, App. *xx*

ARSON.

On an indictment for arson in setting fire to a rick the property of A., evidence may be given of the prisoner's presence and demeanour at fires of other ricks, the property respectively of B. and C., occurring the same night, although those fires are the subject of other indictments against the prisoner, such evidence being important to explain his movements and general conduct before and after the fire of A.'s rick; but evidence is not admissible of threats, statements, or particular acts pointing alone to the other indictments, and not tending to implicate or explain the conduct of the prisoner in reference to that fire. *Reg. v. Taylor*, 138

A. being possessed of freehold land, employed capital in building houses upon it. At the time in question, twenty or thirty houses

were in course of erection. A. providing the materials and personally superintending the work, which was performed by persons sometimes under contracts with him, and sometimes directly employed by him. His object was to dispose of the houses when he could find purchasers. The building alleged to have been destroyed was erected by him four or five years before, for the convenience of his works. It was twenty-four or twenty-five feet square, its sides being of wood, with glass windows, and the roof was slated. It was commonly called a workshop. It was used as a storehouse for seasoned timber, as a place of deposit for tools, and sometimes timber was worked up in it and prepared for use. At the time of the fire it contained a quantity of timber so prepared.

Held, that the building was properly described in the indictment as a shed.

Semble, per Paterson, J., it was properly described also as a building used for carrying on the trade of a builder. *Reg. v. Amos*, 222.

ASSAULT.

Quære, whether an indictment under the statute 7 Will. 4 & 1 Vict. c. 85, s. 4, charging the prisoner with shooting at J. C., with intent to maim the said J. C., is supported by the evidence that the prisoner fired a gun in the direction of a light which he supposed was placed, or held, by some person, but having no intent to maim J. C., who was wounded, or any knowledge that he was there. *Reg. v. Porter*, 148

The statute 9 Geo. 4, c. 31, provides (sect. 27) for the summary conviction of persons for common assaults and batteries, and gives power to two justices of the peace to order the offender to pay a fine, with imprisonment in case of nonpayment, or, if the offence be not proved, or is of so trifling a character as not to merit punishment, to dismiss the complaint, and make out a certificate under their hands stating the fact of such dismissal, such certificate to be delivered to the party against whom the complaint was preferred.

Section 28 enacts, "that if any person against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted, shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for nonpayment thereof, in every such case he shall be released from such further or other proceeding, civil or crimi-

nal, for the same cause." "Provided always (sect. 29), and be it enacted, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this Act," &c.

Semble, that a conviction for an assault under the above statute, followed by payment of the fine or endurance of the imprisonment, may be pleaded in bar of an indictment for felony in respect of the same assault, charging an assault and wounding with intent to murder, &c. *Reg. v. Stanton*, 324

On an indictment charging a misdemeanour for an assault in attempting to commit a rape on A. B., with a count for an assault of the same nature on a different day on C. D., it is competent to the prosecutor, not only in law, but by ordinary practice, to give evidence of both assaults. *Reg. v. Davies*, 328

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BANKRUPTCY.

To obtain a conviction under the 253rd section of 12 & 13 Vict. c. 106, it must be shown that the bankrupt had obtained goods within three months of the bankruptcy, by means of a representation which he knew to be false at the time he made it, that he was carrying on business, and dealing in the ordinary course of trade, and that he required the goods for the purpose of such business. Such representation must be actually made by him. It is not sufficient to prove that he has received the goods from a seller, who, by urgent persuasion, induced him to purchase them. *Reg. v. Boyd*, 502.

BASTARDY.

An indictment charged that Mary Hogan, intending to injure the inhabitants of the parish of B., and unjustly to burthen them with the maintenance of her bastard, of very tender age and unable to take care of herself, unlawfully did desert the said bastard child in the said parish, without having provided any means for the support of the said child, the said child not being settled in the said parish B., as the said M. H. well knew, to the damage of the inhabitants, &c.

Held bad, for want of averments, either that the health of the child was injured, or that the defendant had the means of supporting it. *Reg. v. Hogan*, 255.

BREAKING AND ENTERING

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BURGLARY.

A place called the machine-house at chemical works, where a weighing machine was kept, goods weighed, and an account of weights kept in a book; where the account of the workmen's time was taken and entered in books not kept there, but brought there for the purpose; and where their wages were paid:

Held, properly described as a counting-house in an indictment for breaking and entering that building and stealing therein, under 7 & 8 Geo. 4, c. 29, s. 15. *Reg. v. Pollar*, 187

An indictment for burglary charged an intent to "steal goods and chattels." The jury found that the prisoner broke into the house with intent to steal certain mortgage deeds. The mortgage deeds were valid

subsisting securities for money which the prosecutor had advanced to the prisoner.

Held, that they could not properly be described as "goods and chattels," and that the indictment was not proved. *Reg. v. Powell*, 396.

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COINING.

If two persons are engaged in the common purpose of uttering counterfeit coin, and, in pursuance of that purpose, one, in the absence of the other, puts off some pieces of the counterfeit coin, both may be convicted as principals, an absent participator in misdemeanor being a principal.

R. v. Else (R. & R. 142); and *R. v. Page* (1 Russ. on Crimes, 82), overruled. *Reg. v. Greenwood*, 521

COMBINATION ACTS.

The Philanthropic Society of Coopers was formed in order to relieve its members when sick, and to provide for their funerals. One of their members was fined by them for working in a yard where steam machinery was used, and upon non-payment of the fine they acted in such a way as to prevent him from obtaining work:

Held, an illegal combination and conspiracy. *Reg. v. Hewitt*, 162

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CONSPIRACY.

Defendants were indicted for conspiring to procure the removal of certain foreign goods from bonded warehouses, without payment of the duties due upon removal. The Customs Acts in force at the time assigned to the conspiracy were stats. 3 & 4 Will. 4, cc. 51, 61, which were repealed except as to duties payable under them) by stat. 8 & 9 Vict. c. 84. The indictment

was not preferred until after the passing of the latter statute.

Held, that neither the limitation clause in stat. 3 & 4 Will. 4, c. 53, s. 120 (which was in the same language as stat. 8 & 9 Vict. c. 87, s. 134), nor the repeal of the acts themselves, was any answer to the indictment.

An indictment for conspiracy charged "that A., B., and C. did conspire together, and with divers other persons to the jurors unknown," &c. No evidence was offered affecting any other persons than A., B., and C. The jury found A. guilty, but acquitted B. and C., being of opinion that either B. or C. was guilty, but not being able to determine which of the two:

Held, by Lord Campbell, C.J., Patteson and Coleridge, J.J. *dissentiente*, Erle, J., that the verdict was inconsistent, and that A. was entitled to an acquittal. *Eg. v. Thompson*, 166

1st. It is a clearly established rule of law that workmen have a right, while they are perfectly free from engagement, and have the option of entering into employment or not, to agree among themselves that they will not go into any employment, unless they can get a certain rate of wages, and each man, for himself, may say, "I will not go into any employ unless I can get a certain rate of wages;" and all of them may say, "we will agree with one another, that in our trade, as able-bodied workmen, we will not take employ unless the employers agree to give a certain rate of wages."

2nd. But workmen have no right to combine together to persuade men already hired by and in the employ of other masters to leave that employment, for the purpose of compelling those masters to raise their wages.

3rd. Therefore, a conspiracy to obstruct a manufacturer in carrying on his business, by inducing and persuading workmen who had been hired by him, to leave his service, in order to force him to raise his rate of wages, or to make an alteration in the mode of conducting and carrying on his trade, is an indictable offence; and an agreement to induce and persuade workmen under contracts of servitude for a time certain, to absent themselves from such service, is an indictable offence, although no threats or intimidation be proved, or any ulterior object averred.

4th. Workmen who agree that none of those who make the agreement will go into employ unless for a certain rate of wages, have no right to agree to molest, or intimidate, or annoy other workmen in the same

line of business, who refuse to enter into the agreement, and who choose to work for employers at a lower rate of wages; and,

Semble, such agreement to molest or intimidate is an indictable conspiracy, as well in relation to workmen willing to be hired and employed, as to those already hired and employed.

5th. In these cases, the essence of the offence is the combination to carry out an unlawful purpose, and the unlawful combination and conspiracy is to be inferred from the conduct of the parties. If several persons take several steps, all tending towards one obvious purpose, it is for the jury to say whether those persons had not combined together to bring about that end which their conduct so obviously appears adapted to effectuate.

6th. P., a manufacturer, having been applied to by R., the secretary of a trade society, and by other persons, to adopt a particular scale of prices, refused to comply, and immediately afterwards the defendants and R. were severally seen about the manufactory of P., watching, and in conversation with his workmen; and at the same time a printed placard, signed by R., was distributed, stating that P.'s wages were below the average. This was followed by the desertion of P.'s workmen, some of whom were seen in the company of one of the defendants, who was also proved to have proposed and assisted with money and otherwise, in effecting the removal of such workmen to distant parts of the country. Evidence was also given of the defendants being seen together on other occasions, and at "shop" meetings relating to the wages of the workmen.

Held, evidence of a conspiracy by the defendants to induce and persuade P.'s workmen to leave his service, in order to compel him to raise his wages.

7th. Held, also, that the above circumstances, with the additional fact that P. having advertised for workmen, persons offered, and were accepted as workmen, and agreed to come on the following day, but none of them did come, was evidence to support a count charging the defendants with conspiring by molesting and obstructing such workmen as might be willing to be hired by T., to prevent them from hiring themselves to him.

8th. If persons conspire together to take away the workmen of a manufacturer, that constitutes such an obstruction and molestation of him as to support that part of a count which alleges a conspiracy by molesting and obstructing him.

9th. If a handbill says that certain things will be done by certain persons, and that handbill is circulated where it is probable those persons would see it, and they do the very thing that the handbill indicates they would do, the contents of the handbill are admissible in evidence against them; but,

Semble, that a handbill declaratory of the intentions of certain persons, is not evidence against parties not expressly named in it, although there is evidence from which it may be inferred that they assisted in carrying out acts indicated in the bill, and that they co-operated with the person whose signature is affixed to the bill, the evidence of such connection stopping short of proof of agency, or of a conspiracy between all the parties existing at that time.

10th. In order to render the speech of a third person at a meeting admissible in evidence on an indictment for conspiracy against third parties, not present at that meeting, it must be shown either that such third person was co-operating at that time with the defendants as a co-conspirator, and engaged with them in one common purpose, or that he was acting as the agent of the defendant. Therefore, on an indictment for conspiring to intimidate and seduce workmen, evidence that the defendants and third parties were watching and speaking together, under circumstances from which the prosecution sought to establish the charge of conspiracy, was held insufficient to let in a speech made by one of such third persons in the absence of the defendants, for it was not to be assumed that the parties were watching and speaking for the purpose of intimidating and seducing workmen, for that was the actual issue in the case.

11th. The only principle of admitting what A. says in the presence of B. in evidence against B., is founded upon the supposition that B. would say "it is not true," if it was not true, and his silence goes to the jury as evidence from which an assent may be inferred. But that which is said by a man in a judicial position is often not assented to by those who hear it, and they have not an opportunity of arguing it, and, therefore, it is not admissible in evidence against them.

12th. A prosecutor having applied to the mayor of a town for protection against certain parties, the mayor, after hearing both sides of the question, expressed an opinion:

Held, that the witness cannot be asked,

on cross-examination, what the mayor said; and,

Semble, that it is immaterial whether what the mayor said was in the nature of a judgment, a decision, or a mere opinion.

13. A witness may name a written instrument, although not produced. A witness may, therefore, state that at a certain period he entered into "contracts" with his men, without producing them at the time. *Reg. v. Duffield*, 406

1st. Workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand; and,

Semble, other persons, not workmen, may combine with them to assist in that purpose, but the law is only clear to the extent that the combination is lawful while its purpose is to obtain a benefit for the parties who combine.

2nd. *Quere*, whether a combination to force a manufacturer to assent to certain wages, or a uniform book of prices, is in itself lawful, but a combination to bring about that purpose by any unlawful means is an indictable offence, whether it be by intimidation or threats to the workmen, or by intimidation or threats to the manufacturer.

3rd. An intention to create alarm in the mind of a manufacturer, and so to force his assent to an alteration in the mode of carrying on his business, is a violation of the law, and supports a charge of conspiring by molesting the manufacturer, to force him to make an alteration in the mode of conducting and carrying on his trade and business.

4th. A conspiracy to obstruct a manufacturer, in order to force him to alter his mode of carrying on his business, by inducing hired workmen to leave their employment by intoxicating them and carrying them off into concealment, is an indictable offence.

5th. *Semble*, a conspiracy to obstruct a manufacturer, and so to force his consent to a book of prices, by persuading and giving money to his workmen not under contract, to leave their employment, is also indictable.

6th. The contents of a written document are evidence against a person whose name appears in it, and who has assented to its publication.

The contents of a printed placard exhibited in the window of a public house, and purporting to be signed by the secretary, on behalf of an association, held evidence against such secretary, if he saw

it in the window, and allowed it to remain there.

So, also, where the placard announced acts done by A. B. and O. D., and they, seeing it, allowed it to remain in the window:

Held, that this was evidence of a recognition by them of the whole contents of the placard.

Proof that the parties signing it and named in it were seen going in and out of the house, and close to the window of the room where the placard was exhibited, is evidence for the jury that they saw it and recognised the publication.

7th. On an indictment for conspiring by molesting a manufacturer, to force him to make an alteration in the mode of conducting his business, and a part of the charge, and the evidence in support of it, being the inducing hired workmen and apprentices to leave their employment, the following question to a witness, called for the defendants, and who was present at various interviews between the defendants and the workmen, was allowed to be put and answered:—"With reference to hired men and apprentices, what advice did the defendants give to the men?" and, also, whether the witness ever heard the defendants use any intimidating language or threats, or recommend force of any kind?

8th. The prosecutor having stated that, in consequence of the desertion of his workmen, he had been forced to procure French artisans, who broke their contract, and went away:

Held, that he could not be asked how much he had lost by the Frenchmen, the amount of loss by any particular set of labourers being unconnected with the issue to be tried, but otherwise as to the total amount of loss, for the intention to obstruct is in issue, and the result of the operations is a relevant fact as to that. The witness, therefore might be asked whether, by reason of the workmen having left him in the manner described, he had sustained serious pecuniary loss. *Reg. v. Rowlands*, 436

In an indictment for conspiracy to commit an offence under the stat. 6 Geo. 4, c. 129, s. 3, namely, by threats or intimidation, or by molesting or in any way obstructing another, to force or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, to depart from his hiring, employment, or work, or by threats or intimidation, or by molesting, or in any way obstructing another, to force, or endeavour

to force, any manufacturer or person carrying on any trade or business to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, it is sufficient to follow the words of the statute, and it is not necessary to set out the means of obstruction, the nature of the molestation, or what the threats were.

Semble, a distinction exists in this respect between an indictment or conviction for the offence itself, and a charge of conspiracy, in which the threats, &c., are the means used for carrying out the purpose.

It is not necessary to set out the names of the workmen threatened, &c.

Therefore, a count alleging that R. P. and G. P. carried on trade and business as manufacturers of japanned and tinned wares at W., and that divers, to wit, fifty persons, were workmen, and were hired and employed by and worked as workmen for the said R. P. and G. P., in their said trade and business; and that the defendants, on, &c., did amongst themselves unlawfully conspire, combine, confederate, and agree together, by unlawfully molesting the said workmen so hired and employed by and working for the said R. P. and G. P. in their said trade and business as aforesaid, to force and endeavour to force the said workman so hired and employed by and working for the said R. P. and G. P. as aforesaid, in their said trade and business as aforesaid, to depart from their said hiring, employment, and work, to the great damage of the said R. P. and G. P., &c., was held sufficient.

So also, other counts, charging the overt acts to be by "unlawfully using threats" to, and by "unlawfully intimidating" the workmen, were held sufficient.

A conspiracy to induce and persuade workmen under contract unlawfully to absent themselves from their service is an indictable offence.

In a count for that offence, it is not necessary to allege that the defendants knew that the workmen were under contract, nor to set out the names of the workmen, nor to allege that the contracts were entered into after the passing of the statute 4 Geo. 4, c. 34, s. 3, which makes any servant, &c., who shall contract with any person whomsoever to serve him for any time whatsoever, or in any other manner, and shall not enter into or commence his service according to his contract (such contract being in writing, and signed by the contracting parties), or having

entered into such service, shall absent himself from his service before the term of his contract (whether such contract shall be in writing or not) shall be completed, liable to three months' imprisonment on conviction.

Held, therefore, that a count in the following form is sufficient:—"That heretofore, before, and at the time of the committing of the offence hereinafter in this count mentioned, the said R. P. and G. P. carried on trade and business as manufacturers of japanned and tin wares at W. aforesaid, and that divers, to wit, fifty persons, being artificers had contracted with the said R. P. and G. P. to serve them as workmen in their said trade and business for certain times and periods agreed upon between them and the said R. P. and G. P.; and that the said persons, so being such artificers as aforesaid, had entered into the service of the said R. P. and G. P. as such manufacturers as aforesaid;" and that the defendants, on, &c., "did amongst themselves unlawfully conspire, combine, confederate, and agree together, by divers subtle means and devices, to induce and persuade the said artificers, so having contracted with the said R. P. and G. P. as aforesaid to serve them in their said trade and business for certain terms and periods so as aforesaid respectively agreed upon between them and the said R. P. and G. P. as aforesaid, and so having entered into the service of the said R. P. and G. P. as aforesaid, unlawfully to absent themselves from the said service of the said R. P. and G. P., without the consent of the said R. P. and G. P., or either of them, before the respective terms of their said contracts as aforesaid were completed, to the great damage of the said R. P. and G. P.," &c.

Quere, whether counts in the following form are insufficient, as being too vague:

1st. "And the jurors aforesaid, &c., do further present, that [the defendants], with divers other evil-disposed persons, on the day aforesaid, in the year aforesaid, with force and arms, at, &c., did unlawfully conspire, combine, confederate, and agree together unlawfully to intimidate, prejudice, and oppress one R. P. and one G. P. in their trade and occupation as manufacturers of japanned and tin wares, and to prevent the workmen of the said R. P. and G. P. from continuing to work for the said R. P. and G. P. in their said trade and occupation, to the great damage of the said R. P. and G. P.," &c.

2nd. "And the jurors, &c., that [the defendants], with divers other evil-disposed persons, on, &c., did unlawfully conspire, combine, confederate, and agree together, by divers subtle means and devices, and wicked acts and practices, to injure and oppress the said R. P. and G. P. in their trade, business, and occupation of manufacturers of tin and japanned wares, and to induce the workmen of the said R. P. and G. P. to depart from their employment and work with the said R. P. and G. P. before the period of their agreement with the said R. P. and G. P. was completed, to the great damage of the said R. P. and G. P. aforesaid," &c.

3rd. "And the jurors, &c., that [the defendants], with, &c., on, &c., did unlawfully conspire, &c., unlawfully to intimidate, prejudice, and oppress one R. P. and G. P. in their trade and occupation as manufacturers of, &c., and to entice and seduce away the workmen of the said R. P. and G. P. from the employment of the said R. P. and G. P., and thereby to injure and oppress the said R. P. and G. P. in their said trade and occupation, to the great damage," &c.

Under a count alleging that the defendants did unlawfully conspire, combine, confederate, and agree together, by molesting the said R. P. and G. P., to force and endeavour to force the said R. P. and G. P., so carrying on their trade and business as aforesaid, to make an alteration in the mode of conducting and carrying on their trade and business as aforesaid.

Held, by Erle, J., that evidence might be given of attempts to force men under contracts to leave. *Reg. v. Rowlands*, 469 Of workmen to raise wages, 162

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CONTEMPT OF COURT.

Any comments in a public newspaper calculated to excite feelings of hostility towards persons who are liable to be tried on a criminal charge, are a contempt of the court in which the proceedings are pending.

Where an article appeared in a public newspaper, commenting on the disagreement of a jury in a criminal case in this court, in a manner calculated to influence against the accused the minds of persons who might subsequently be called on to act as jurors in that and other cases of a similar nature, which were pending, the court refused to attach the publisher, only one such article having appeared, and no previous warning having been given to the public press to abstain from commenting on the proceedings, but highly censured the publication, and made an order prohibiting the publication in any newspaper, of any comments upon the proceedings of the session.

An affidavit in support of such an application need not be entitled in any cause. *Reg. v. O'Dogherty*, 348.

A. B. having been convicted of an offence against the Act for the better security of the Crown and Government of the United Kingdom, shortly after the termination of the trial, a brother of the prisoner proceeded to the residence of the foreman of the jury by whom the prisoner was found guilty, accused him of having bullied the jury into finding the prisoner guilty, and challenged him to mortal combat:

Held, that this was a contempt of the court before which the trial was had; and,

Seemle, that it was also an indictable misdemeanour, punishable by fine and imprisonment. *Reg. v. Martin*, 356

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COSTS.

An indictment under the statute 8 & 9 Vict. c. 109, which enacts that every person who, by fraud, or unlawful device, or ill practice in playing at cards, &c., shall win from any other person any sum of money or valuable thing, "shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof, shall be punished accordingly," is within the meaning of the statute 7 Geo. 4, c. 64, s. 23, which empowers the court to order the costs of prosecutions and indictments (*inter alia*) for "knowingly and designedly obtaining any property by false pretences." *Reg. v. Gardner*, 140

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The counsel in the case may be examined to

show from his notes, taken at the former trial, what was the evidence then given.

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EMBEZZLEMENT.

By stat. 2 & 3 Vict. c. 93, for the establishment of police constables, power is given to the justices of a county or division to appoint a chief constable, who, subject to the approval of two justices, has the power to appoint constables and superintendent constables. It was the duty of the constables of the county of S., so appointed, to account for and pay weekly to the superintendent of their division all moneys

received by them, and it was the duty of the superintendent to return weekly to the chief constable a statement of such moneys. It was also the duty of the superintendent to pay the constables their wages weekly. In practice, however, it was the custom of the superintendent, in balancing the accounts with his men, to set off the sums received by them in the course of their duty against their wages, the balance struck going over to the next account, and so on from week to week without any money actually passing from one to the other. A constable having in this way accounted to the superintendent for the sum of 2*l.* 3*s.* 6*d.* received by the former, the latter fraudulently omitted that sum in his account with the chief constable, and subsequently denied its receipt.

Held, per Patteson, J., that there was a constructive receipt of that sum by the superintendent from the constable, so as to support the allegation of the receipt of the money in an indictment against the superintendent for embezzlement.

Held, also, that the superintendent was the clerk and servant of the chief constable, and that the money might be alleged to have been received for and on his account.

Held, that the superintendent could not be described as the clerk or servant of the treasurer of the county, to whom the chief constable transmitted all sums received by him from the superintendent.

The 3 & 4 Vict. c. 88, directs that the moieties of fines imposed by the justices, on informations laid by the police constables, should be invested in such manner as the justices should direct, so as to form a superannuation fund for the constables. A superintendent of police, having received a sum of money from the clerks of justices, the amount of penalties imposed by them on the information of such superintendent, and the latter having fraudulently omitted to account for such sum to the chief constable,

Query, whether an indictment for embezzling such sum could be supported under these circumstances; and

Query also, whether, if it could, the superintendent should be described as the servant of the chief constable, or of the trustees of the superannuation fund. *Reg. v. Baxter*, 302

A person hired by a market gardener to do a day's work, and who is requested by his employer to take some vegetables to market and sell them, and bring back the produce, is a servant to his employer in respect of such employment, within the statute 7 & 8

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Geo. 4, c. 29, s. 47, defining the crime of embezzlement.

The prisoner, being employed as above mentioned, sold four pots of potatoes, and received the money. He sold four other pots, but did not receive the money. On his return to his master, he stated correctly the price he sold the potatoes for, but said that he would settle with him on a subsequent day, as he had not received the money, and did not offer the sum received, or say he had been paid for a part, and subsequently made the same excuse, and never paid any part of the money:

Held, that this was not embezzlement, unless the prisoner, when he said he had not received the money, meant that he had not received any part of it. *Reg. v. Winnell*, 326
The duty of a servant was to go into a neighbouring county, D., every Monday, and there collect moneys for his master, and to return to N., where the master lived, and to pay over what he had received on Saturday night.

The servant received money for his master in county D., but did not return to his master and account on the following Saturday. Two months afterwards his master met him in N., and asked him for the money, upon which he stated that he was sorry that he had spent it:

Held, that there was evidence for the jury of an embezzlement in N. *Reg. v. Murdock*, 360

A contracted with B. to manage a farm for him as bailiff, receiving a yearly salary and a certain share of the clear profits after all expenses paid. He was instructed to account, and did account, at stated periods; but on one occasion denied the receipt of two sum of money, which had been paid to him in the course of the business of the farm:

Held, that A. was guilty of embezzlement, the relation of master and servant being created by the contract; and that the contract was admissible in evidence without a stamp, being a contract for the hire of "a labourer" within the exemption in the Stamp Act. *Reg. v. Wortley*, 382

EVIDENCE.

Where a trial has been postponed from one session to another, a notice to produce served on the prisoner in time for the first session is available for the subsequent one without any fresh service.

Service on prisoner in gaol is sufficient. *Reg. v. Robinson* 183

The deposition of a witness taken before a magistrate under the statute 11 & 12 Vict.

c. 42, against an accused person is not admissible in evidence against that person, upon his trial, upon mere proof that the witness is absent, and cannot be found, or that he is kept out of the way by the procurement of some one other than the accused person himself.

Therefore, when, upon the trial of three persons for larceny, it was shown that a witness was kept away by the procurement of one of the prisoners, and the deposition of the absent witness was received in evidence generally against all the prisoners:

Held, that, as regards the two prisoners who did procure the absence of the witness, the deposition was improperly admitted *Reg. v. Scarfe*, 243

Where witnesses are called on the part of the prisoner to give evidence of his general good character, it is not competent to the prosecution to call witnesses to give evidence of the prisoner's general bad character. *Reg. v. Burt*, 284

One of two prisoners had married his deceased wife's sister:

Held, that she was a competent witness against him upon his trial.

A witness for the prosecution was examined on the part of the prisoners on the *voir dire*, and deposed that she was married to one of them:

Held, that she might be further examined on the *voir dire*, on the part of the prosecution, to prove that the same prisoner had been previously married to her sister.

The witness stated, on such further examination, that she and her sister, who was seven years older than herself, had always lived together with their parents, and that she always believed her to be her sister:

Held, sufficient proof of the relationship.

Reg. v. Young and another, 296

It is not sufficient that the person making declarations was dying, to constitute those declarations evidence, unless deceased was clearly and expressly warned that he could not live, or unless he had expressed his knowledge that he was dying. *Reg. v. Mooney*, 318

Statements made in the prisoner's presence after his arrest, are not admissible to prove that a charge was made against him, and what it was. It must appear that, if not in the execution of his duty, an officer was known as such, to make a threatening resistance to giving up arms not justifiable. *Reg. v. Morrissey*, 321

To caution a prisoner that what he said would be used against him on his trial, if committed, is not an inducement to him to

make a statement so as to exclude that statement from being given in evidence on the trial. *Reg. v. Atwood*, 323

Upon the trial of a prisoner for larceny, one of the witnesses for the prosecution, in answer to questions by the prisoner's counsel, stated that he had known the prisoner six or seven years, and that he had borne a good character for honesty. Thereupon, the prosecution proved that the prisoner had been convicted of larceny ten years before:

Held, that the previous conviction was admissible under 6 & 7 Will. 4, c. 111, and 14 & 15 Vict. c. 19. *Reg. v. Shrimpton*, 387

Letter admissible to prove identity of an absent accomplice. *Reg. v. Burnet*, 399

Council to cross-examine witness in the order in which defendants stand in the indictment. *Reg. v. Rowlands*, 436

It is not necessary to be clearly shown that statements, made by a prisoner on his examination before a magistrate, were reduced to writing, in order to exclude parol evidence of such statements. *Reg. v. McGovern*, 506

Before admitting a person as an approver, it is the duty of the magistrate to inquire into the case, and see how far such approver is mixed up with the transaction or to what extent he would be criminally liable for his acts.

Though an accomplice, who has been admitted as an approver, may give evidence, no matter how great his own criminality, it is a wise observation that, without corroboration, a jury should be slow to convict on such evidence. *Reg. v. Dunne*, 507

A constable upon apprehending a prisoner on a criminal charge, addressed to him these words: "You need not say anything to criminate yourself. What you do say will be taken down, and used in evidence against you."

Held, that those words did not import any threat or inducement to the prisoner; and that a statement made by him subsequently was admissible as evidence against him upon his trial: (*E. v. Drew*, 8 C. & P. 140; *R. v. Morton*, 2 Moo. & Rob. 514; *R. v. Furley*, 1 Cox C. C. 76; and *R. v. Harris*, *ib.* 106, overruled.) *Reg. v. Baldry*, 523

Upon a trial for child murder the prisoner's confession to a surgeon, who was attending her, was offered in evidence. Before the surgeon came in, her mistress had told her that she had better speak the truth; and she had said, in answer, that she would tell it to the surgeon; but the husband of the mistress was not the prosecutor:

Held, that as the offence was not an offence against the mistress, she was not a person in such authority that the inducement which she had held out would exclude the confession, which was consequently admissible. *Reg. v. Moore*, 555

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FALSE PRETENCES.

A. was employed to make purchases on account of his masters, and B., a fellow-servant, had instructions from them to pay out of their money all such demands as A. should make upon him in respect of such purchases.

A. having falsely represented to B. that he had bought goods for the masters, and paid for them, and having thereby obtained from B. a sum of money, the property of the masters :

Held, not guilty of larceny, but false pretences. *Reg. v. Barnes*, 112

An indictment charged the defendant with having attempted, by false pretences made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B. and others. On the trial it was proved that the pretences were, in fact, made to J. B. alone, with intent to defraud J. B. and certain other persons, his partners, of property belonging to the firm :

Held, that there was no variance between the indictment and the proof. The words "and others" in the description of the persons to whom the pretences were alleged to have been made might be rejected as surplusage. *Reg. v. Kealey*, 193

An indictment against A. Z. and G. B. for false pretences, alleged that the defendants falsely pretended to one A. W. that a certain vessel, called *The Castenet*, then was in Penarth Road (meaning a certain part of the Bristol Channel), and that the said A. Z. then was the master, and the said G. B. then was the mate of the said vessel, and that they the said G. B. and A. Z. then wanted the sum of 3*l.* to pay for the pilotage of the said vessel, whereas, in truth and in fact, a certain vessel called *The Castenet*, was not then in the Penarth Road, and whereas the said A. Z. was not then master, and the said G. B. was not then mate, of such vessel :

Held, that the negative of the pretence, that the defendants were respectively the master and mate of a vessel, was sufficiently shown by proof that no vessel had arrived in the port, or had been heard of, answering the defendant's description; the pretence set out having been accompanied by a statement by the defendants that they expected the vessel in three days.

No evidence having been given that the defendants called the alleged vessel by any name :

Semble, that the court had power, under the statute 14 & 15 Vict. c. 100, s. 1, to amend the indictment, by striking out the words called "*called The Castenet.*" *Reg. v. Baroisse*, 559

Indictment for, pretending that a society was enrolled, precedent of, App. lxxix.

Indictment for, by pretending that defendant was free from debts, precedent of, App. xc

Indictment for obtaining money by, App. li

FORGERY.

An indictment charged in the first count that the prisoner "feloniously did falsely make, forge, and alter a certain accountable

receipt for money, which said accountable receipt is as follows:

'Ulster Bank, Branch No. 1. Enniskillen, 14th January, 1851.—We have received from the Lowtherstown Union four pounds sterling, which is placed to the credit of their account with the Ulster Banking Company, 40l.—Samuel Clarke, manager. Entered, Alex. H. Stockdale.'—with intent to defraud the Guardians of the Poor of the Lowtherstown Union." In a second count the prisoner was charged with feloniously uttering and publishing as true a certain other false, forged, and altered accountable receipt for money (setting out the instrument as in the first count) and with the like intent. It was proved that the prisoner was a poor rate collector of the union, and that it was his duty, about the time laid in the indictment, to have lodged about 40l. with the Ulster Banking Company, who were the treasurers of the union, and were in the habit of furnishing weekly accounts, showing the sums lodged by each collector; and it appeared that it was from such accounts so furnished that the collectors got credit in their accounts with the union; and that in auditing the collectors' accounts, it was not the usage to refer to the receipts to ascertain the sums lodged by them; and it was also proved that the sum actually lodged by the prisoner was 4l., but that he, at the audit of his accounts, produced the receipt as a receipt for 40l., alleging that he had lodged that sum in the bank the day before, and that the word "four" in the body of the receipt was put in by mistake of the bank clerk. The jury having found that the prisoner altered and uttered the receipt with intent to defraud the guardians:

Held, that the document in question was an accountable receipt within the statute; that the alteration was made in a material part, and that the prisoner having made such an alteration of the receipt as was calculated to deceive the officer of the union, was upon the evidence rightly convicted. *Reg. v. Johnston*, 133

A. B. owed money to C. D., and the prisoner forged and delivered to A. B. a letter purporting to be written by C. D. in the following terms: "A. B., London. Bought of C. D., English and Foreign fruit merchant and potato salesmen, two bushels of apples, 9s. Sir,—I hope you will excuse me for sending for such a trifle, but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock there will be an action com-

menced against me, and I am obliged to hunt after every shilling. Yours, &c., C. D.;"

Held, that the document was a warrant for the payment of money within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 3.

Semble, per Erle, J., and Cresswell, J., it was also an order for the payment of money. *Reg. v. Dawson*, 220

Where prisoner had fraudulently used the name of another person for the purposes of his trade, and had afterwards accepted a bill in that name:

Held, that he could not be convicted of forgery, unless, when he first assumed the fictitious name, he contemplated the making of that specific bill. *Reg. v. Whyte*, 290

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FRAUD.

Larceny by, 372, 533

GAME.

If an indictment under sect. 9 of 9 Geo. 4, c. 69, the night poaching act, describes the land entered as certain land in the occupation of A. B., or of A. B. and C. D., in the parish, &c., it is sufficient; and if three of one party are proved to have entered any land answering such description, whether they were all in the same close or not, they may properly be convicted, if the other ingredients of the offence are established.

Reg. v. Uxwell, 188

Night poaching, 277

GAMEKEEPER.

A count for assaulting a gamekeeper under the stat. 9 Geo. 4, c. 69, s. 2, alleged that the defendants, with other persons to the number of three and more, entered by night a certain close, with guns and other offensive weapons, for the purpose of taking and destroying game, and then proceeded to allege that the defendants being then and there in the said land, were found by one H. S., the servant of one B. W. W., and there with the said guns assaulted and beat the said H. S., &c.:

Held, that the count was defective for not alleging that the defendant were in the close armed with guns, &c., according to the language of the 9th section of the statute.

Semble, that in an indictment under the 9th section, which makes it a misdemeanour if any persons to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or de-

stroying *game* or rabbit, any of such persons being armed, &c., it is sufficient to allege that the defendants "UNLAWFULLY" entered, without alleging the particular facts which rendered the entry unlawful.

Seemle, that the allegation that the defendants entered for the purpose of taking or destroying *game* is sufficient, without specifying the particular description of game.

An indictment under the 9 Geo. 4, c. 69, s. 8, alleged that the defendants on the 15th day of December, 1850, at the parish of F., in the county of B., "about the hour of six in the night of the same day, being then and there respectively armed with guns and other offensive weapons, did then and there together by night as aforesaid, and armed as aforesaid, unlawfully enter certain land called O. C. there situate, and were then and there by night as aforesaid, and armed as aforesaid, together unlawfully in the said land for the purpose THEN AND THERE of taking and destroying game."

Query, whether the words "then and there" last mentioned amounted to an allegation that the defendants were then on the land for the purpose of taking game *by night*, and whether, if not, an express averment to that effect was necessary?

Held, also, per Patteson, J., that in order to support a conviction under this indictment, the evidence must show that all the three men actually entered the coppice, and that a constructive entry was insufficient. *Reg. v. Mag*, 176

GRAND JURY.

It is the duty of a grand jury, when in doubt as to whether the traverser is legally guilty, or can be convicted for the crime for which bills are sent up to them, if they believe him morally guilty, to find the bills, and give the court an opportunity of deciding the point. *Reg. v. Copeland*, 299.

HIGHWAY.

Under a Turnpike Act prohibiting the erection of a toll-house in any "town," the word "town" is rightly defined as an inhabited place where the dwelling-houses are contiguous, not necessarily touching each other, but so reasonably near that the inhabitants may be said to be living together.

A local Act of Parliament, which was to remain in force for thirty-one years, prohibited turnpike trustees from "continuing or erecting any turnpike or toll-

gate across the roads in the towns of T. and W., or in any other town through or into which the said roads might pass or be made."

Held, that that these words were not to be limited to the "towns," as they were at the passing of the Act, but that it was unlawful for the trustees to erect a toll-house in any part of the road which, by the increase of buildings, had become part of the town of T. since the passing of the Act. *Reg. v. Cottle*, 157

A public turnpike road, which went over the property of a large pit owner, was crossed by tram-roads leading to the pits. As pits were opened on one side of the road, tram-roads leading to and from the pits had always for many years been made across the road. They were let into a groove in the road, so that the highest part of the tram-road was on a level with the turnpike road. By the Turnpike Act, the trustees of the road had power to grant licences for these tram-roads. Upon an indictment for obstructing the road:

Held, that the tram-roads were an obstruction, and that there could not be a dedication to the public with a reservation by the owner of the soil of the power to make as many of such tram-roads as he should think right for the convenient use of his property. *Reg. v. Charlesworth*, 174
The 1st count of an indictment alleged that a certain highway, in the township of W., was out of repair, and that the inhabitants of the said township were by custom bound to repair it.

The 2nd count, after alleging a custom for the inhabitants of the township to repair all roads within it, which otherwise would be repaired by the parish, proceeded thus: "That the said part of the said common highway hereinbefore-mentioned to be ruinous and in decay as aforesaid, was a common highway, which but for the said usage would be repairable by the parish at large; and that by reason of the premises, the inhabitants of the township ought to repair and amend the same part of the said common highway, so being ruinous and in decay as aforesaid, when and so often as it hath been and shall be necessary; and that the inhabitants of the township have not yet done the same."

A verdict of not guilty having been found upon the first count, and of guilty upon the second:

Held, upon a motion in arrest of judgment upon the second, that that count sufficiently referred to the first to import into it the allegations contained in the first

count, that the road was situate in the township of W., and was out of repair. *Reg. v. Inhabitants of Waverton*, 400

At the trial of an indictment preferred against an individual for not repairing a highway, which the indictment alleged that he was liable to repair by reason of his tenure of lands in the parish, called the "Saw-pit field," the prosecutor put in evidence a conviction, in the year 1801, of one S., a former owner of "Saw-pit field," for not having repaired, as by his tenure of "Saw-pit field" he ought, the said highway, and also showed certain repairs actually done by former owners since 1801. The defendant, in answer, showed an award and agreement, dated 1801, which found, in effect, an immemorial usage for the repair of the road by the proprietors of "Sawpit field," and that S. was liable to repair it; and it directed that he should plead guilty to an indictment for non-repair *ratione tenuræ*. The jury convicted the defendant, and the court reserved the question, whether the usage in respect of which the defendant was charged in the indictment was established:

Held, Platt, B., *dissentiente*, that the question must be taken to inquire whether there was any evidence to go to the jury in support of the usage; that the conviction was clearly *prima facie* evidence; and,

Semble, that it was conclusive evidence by way of estoppel. *Reg. v. Blakemore*, 513

HOUSEBREAKING.

A. was in the service of B., and lived in a house close to B.'s place of business. B. did not live in the house himself, but he paid the rent and taxes. A. paid nothing for his occupation. Part of the house was used as store-rooms for B.'s goods:

Held, that this was the dwelling-house of B., and was improperly described in the indictment as the dwelling-house of A. *Reg. v. Courtenay*, 218

Whether an implement is to be considered an implement of housebreaking, within stat. 14 & 15 Vict. c. 19, s. 1, must depend upon the purpose for which the person charged has possession of it.

Any implement that may be used for the purpose of housebreaking, if the jury find it to have been in the possession of the person charged for that purpose, at the time and place alleged, is an implement of housebreaking within that section, although it may also be an implement which is used in the ordinary affairs of life for lawful purposes.

Where, therefore, upon the trial of an indictment under that section, the evidence was that the prisoner was found by night, and without lawful excuse, in possession of a number of house-door keys, and a pair of pincers, all of an ordinary description, but not in possession of any of the particular implements of housebreaking enumerated in the section, and the jury found that the prisoner at the time had the keys in his possession for the purpose of house-breaking:

Held, that he was properly convicted of the offence thereby created. *Reg. v. Oldham*, 551.

HUSBAND AND WIFE.

Evidence for and against one another, 296

IMPLEMENTS OF HOUSEBREAKING.

Possession of, at night, 551

INDICTMENT.

This court refused to say that Darius and Tryus were *idem sonantia*, the question not having been left to the jury. *Reg. v. Davis*, 237

A. was sent to the London Dock Company for two hogsheads of sugar, the property of B. By mistake, the Dock Company delivered two hogsheads belonging to C. On the road from the premises of the Dock Company to those of B., A. broke bulk, and abstracted a quantity of sugar.

He was indicted for larceny, and the indictment laid the property in B., but during the trial an amendment was made, and the property was laid in the Dock Company:

Held, that the amendment was authorised by the stat. 14 & 15 Vict. c. 100, s. 1; and that the property was properly laid in the Dock Company. *Reg. v. Vincent*, 587

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LARCENY.

A. was employed by B. to manufacture skins into furs at his (A.'s) own house; he was paid by the piece, and received his earnings weekly at B.'s warehouse, with the other servants. He worked in the same way for other persons besides B. Being entrusted by B. with skins to be made up in the usual manner, he shortly afterwards pledged them with C., who well knew that they belonged to B., and who converted them to his own use.

Held, that there was no larceny of the skins by A., and that, therefore, C. could not be convicted of feloniously receiving them. *Reg. Harris*, 151

On the trial of an indictment for larceny, it appeared that the prisoner having given the prosecutor an order for certain goods, they were sent by a servant with directions not to part with them without the money. On the way the servant was met by the prisoner, who said the goods were for him, and took them, giving two counterfeit halfcrowns in payment. He was

Held to have been properly indicted for larceny.

Held, also, that he might be convicted of the larceny notwithstanding he had been

previously arraigned on and pleaded guilty to a charge of knowingly uttering the two counterfeit halfcrowns. *Reg. v. Webb*, 154
 On the trial of an indictment for stealing a sovereign, it was proved that the two prisoners went into the shop of the prosecutor, and having purchased some goods, laid a sovereign on the counter, and asked for the change. The prosecutor turned round to reach his cash box, procured the change, and laid it down upon the counter when he found that the sovereign was gone:

Held, that he had had such a constructive possession of the sovereign, as would render the prisoners liable to be convicted of larceny if they took up the sovereign with the intention fraudulently to deprive him of it. *Reg. v. Jones*, 156

The fraudulent taking of a railway ticket for the purpose of using it to travel, and so defrauding the railway company, is larceny, although the ticket would, if used, be returned to the company at the end of the journey. *Reg. v. Beecham*, 181

A. employed B. to sell clothes for him. B. received for that purpose a parcel of clothes, a separate price being fixed by A. upon each article. B. was to be paid a percentage upon the amount received, and to bring back the clothes not sold. Instead of selling any, he fraudulently pawned some, and kept the rest for his own use.

Held, that as there was but a single bailment of all the articles, the misappropriation of part determined the bailment as to the rest; and that B. was properly convicted of a larceny of the articles which he had kept. *Reg. v. Poyser*, 241

The prisoners were tenants and occupiers of a house in which were certain gas fittings belonging to a public company. It became necessary that a gas meter should be changed, and the old one was taken down and left in the custody of the prisoners till called for by the company's servant. In the meantime they converted it to their use:

Held, that they could not be convicted of larceny. *Reg. v. Matheson*, 276

On a charge of larceny, it was proved that the prisoner had taken property from ready furnished lodgings that were let to her, and had pawned it:

Held, that the fact that she had frequently pawned and afterwards redeemed portions of the same property, was no answer to the charge. There must not only be the intent, but also the ability to redeem, to render such defence available. *Reg. v. Medland*, 292

The prisoner was employed by the prosecutor to make up canvas bags, at his (the prisoner's) own house. The canvas was cut out at the shop of the prosecutor, and taken away by the prisoner. A portion of it was duly worked up and returned, the remainder was converted by him to his own use :

Held, that he could not be convicted of larceny. *Reg. v. Saward*, 295

Evidence that prisoner took away guns under pretence of bringing them to his employer, a country gentleman, to approve of, and absconded, after pawning them, not sufficient to constitute larceny, inasmuch as the gunmaker placed a certain confidence in the prisoner, by giving him the guns on his own statement. *Reg. v. Copeland*, 299

Clover is "a cultivated root or plant used for the food of man or beast" within the 43rd section of 7 & 8 Geo. 4, c. 29, and therefore the subject of larceny. *Reg. v. Brumby*, 315

A room attached to a shire-hall, and built and used for the purpose of a ball and concert-room, is within the stat. 7 Geo. 4, c. 64, s. 5, which provides, that in any indictment for any felony or misdemeanor, committed in, upon, or with respect to any court, &c., or other building erected or maintained at the expense of any county, in, on, or with respect to any goods or chattels, provided for at the expense of the county, &c., to be used in or with any such court, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, &c.

A chandelier, which had been used as a fixture in the ball-room, and subsequently removed to another part of the building, but not used for any purpose, is also within the same statute, and is properly described as the property of the inhabitants of the county.

A hall-keeper, appointed by the justices, is not bailee of any of the contents of the shire-hall, but is the servant of the inhabitants, and, if he converts to his own use any of the property committed to his care, he may be indicted for larceny. *Reg. v. Window*, 346

Pigeons kept in an ordinary dove-cote, having liberty of ingress and egress at all times by means of holes at the top, may be the subjects of larceny. *Reg. v. Cheafor*, 367

A. and B., by fraud, induced C. to hand over to B. a cheque for 42l., for the purposes of getting it cashed at a bankers. C., at B.'s request, accompanied him to the bank, and directed the clerk how to cash it; but B. handed the cheque to the clerk, and re-

ceived from him four 10l. notes and two sovereigns, with which he shortly afterwards made off. A. had remained behind with forty-two sovereigns, which were to be given to C. on his return from the bank; and the jury found that C. did not intend to part with his property in the cheque and change until B. returned from the bank, and he (C.) had received from A. the forty-two sovereigns :

Held, that A. and B. were both guilty of stealing the notes and gold, inasmuch as B. was entrusted with the bare custody of them only, the possession still remaining in C. *Reg. v. Johnson*, 372

Upon the trial of an indictment for stealing a banknote which had been lost in a public street, but had the name of the owner thereon, the judge told the jury, that if the prisoner knew the owner, or had reasonable ground for believing that he could be found at the time when he first resolved to appropriate the note to his own use, he was guilty of larceny; but if, at that time, he had not that knowledge or belief, he was not guilty :

Held, a misdirection; because, if the prisoner, when he first took possession of the note, so as to know what it was, meant to act honestly with regard to it, no subsequent alteration of that intention, and conversion of the note to his own use, could render him guilty of larceny. *Reg. v. Preston*, 390

A., pretending that he was about to pay B. a sum of money which was due to him, produced a receipt stamp, and placed it before B., who wrote thereon, at A.'s request, a receipt for the amount. A. then took up the paper and carried it away, but never paid the money :

Held, that B. never had such a property in, or possession of, the stamped paper, as to render the taking by A. a larceny. *Reg. v. John Smith*, 533

A person cannot, at the same time, be both a principal in the second degree in the commission of a larceny and also a felonious receiver of the stolen goods. *Reg. v. Perkins*, 554

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LIBEL.

An indictment for libel sufficiently charges it to have been published of and concerning the prosecutor, if it alleges that the defendant published a libel containing false, scandalous and malicious matters of and concerning him.

An indictment set out the following words as libellous: "If Mrs. W. chooses to entertain the Duke of B. she does what very few will do, and she is of course at liberty to follow the bent of her own inclining, by inviting all the expatriated foreigners who crowd our streets to her tables, if she thinks fit."

Held, that they were so; and that no innuendo was necessary. *Gregory v. The Queen*, 247

A criminal information for libel contained several counts. The defendant being convicted, the judgment was, that for the offences in the first count he should be imprisoned for two months then next ensuing for the offences in the second count, two months, to be computed from and after the expiration of the imprisonment on the first count; and so on. The third count was bad:

Held, that the judgment in that count must be reversed; and that the imprisonment on the fourth count would commence from the expiration of the imprisonment on the second.

A criminal information for libel in one count, discharged the publication of the following words: "We have no doubt sufficient information will be obtained for a strong case to lay before the Home Secretary, to enable that functionary to cause it to be intimated to the suspected party that his presence here can be dispensed with, as far as it may be attended with danger to himself:"

Held, that the words did not support an innuendo, which alleged the meaning to be that "the prosecutor was suspected of having and had committed some crime which would bring his life into danger from the laws of England;" and that the count was bad. *Gregory v. The Queen*, 252

LOST GOODS.

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LUNATIC..

A lunatic is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the question at issue.

Whether he have such sufficient understanding is a question to be determined by the judge at the trial, upon examination of the lunatic himself, and any competent witnesses who can speak to the nature and extent of his insanity. *Reg. v. Hill*, 259
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MANSLAUGHTER.

An indictment for manslaughter alleged that the prisoner, P. W. having the care and management of a certain steam engine employed in winding up and letting down the shaft of a coal pit an instrument called a skip, containing certain persons, did, whilst the said persons were so to his knowledge in the said skip, and ascending in the shaft of the said pit, so carelessly, negligently, and feloniously conduct himself, &c., that J. W., the deceased, "then and there being one of the said persons in the said skip, and ascending in the shaft of the said pit as aforesaid, was then and there, by and through the felonious carelessness of the said P. W. in that behalf, involuntarily, and with great force and violence, drawn, cast, and thrown over a certain pulley then and there necessarily used with the said steam engine in the working of the said pit:"

Held, that the indictment was not supported by proof that after the skip had emerged from the shaft it was in consequence of the prisoner not stopping the engine sufficiently soon, drawn up violently against a pulley placed several yards directly above the mouth of the shaft connecting the skip with the engine, by means of which the deceased was thrown out and killed. *Reg. v. Whitehouse*, 144

A coroner's inquisition alleged that the defendants were trustees of a road under an Act of Parliament, and that it was their duty to contract for the reparation of that road; and they feloniously did neglect and omit to contract for the reparation thereof, whereby the same became very ruinous, miry, &c., and a cart which the deceased was driving along the road, went into a hole, and the deceased, being thrown out, sustained injuries of which he afterwards died:

Held, bad, for not showing any such neglect of duty as could render the trustees guilty of manslaughter. *Reg. v. Pocock*, 172

P

If two or more persons go out together with a purpose to commit a breach of the peace, and, in the course of the accomplishment of that common design, one of them kills a man, the other also is guilty of manslaughter. *Reg. v. Harrington*, 231.

On the trial of an indictment against a woman for the manslaughter of her new-born child, the evidence went to prove that the child had dropped from her whilst she was on the privy, and that it had been smothered in the soil:

Held, that if the jury were of opinion that after it had been born the mother had the power of procuring such assistance as might have saved the child's life, and she neglected to procure it, she was guilty of manslaughter. *Reg. v. Middleship*, 275.

If parents have not the means of providing proper food and nourishment for their infant children who are incapable of taking care of themselves, it is their duty to apply for the assistance provided by means of the poor laws.

A married woman who, having a child under such circumstances, wilfully neglects for several days going to the union for the purpose of getting support for it, she knowing that such neglect is likely to cause the child's death, is guilty of manslaughter:

Semble, that she is so responsible, although her husband, having the means of supporting his family, neglects to do so, and the want of food is the result of that neglect.

But in order to constitute the criminal offence, there must be distinct proof of a continued abstaining from applying for relief for four or five days together. *Reg. v. Mabbett*, 339

If the driver of a conveyance use all reasonable care and diligence, and an accident happen through some chance which he could not foresee or avoid, he is not to be held liable for the results of such accident.

The facts that streets are unusually crowded from any public procession, or other cause, instead of excusing a driver when proceeding at his ordinary pace, and with ordinary care, requires him to be particularly cautious and may tend to render him criminally answerable for any accidents ensuing from driving at a rate, and with those precautions, which he might have ordinarily observed.

Where witnesses differ, even materially, as to distances and time, it should not affect their general testimony, or tend to discredit their evidence. *Reg. v. Murray*, 509

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MURDER.

Prisoners were indicted for the murder of their servant girl by, *inter alia*, a series of beatings.

The evidence proved a series of beatings, within the time charged in the indictment, but it was distinctly proved by the surgeon, that these beatings did not produce, or even conduce to her death. The cause of death was proved to be by two blows upon the head, but there was no evidence to show how or by whom they were inflicted, or by which of the prisoners, or by both of them:

Held, that in the absence of any such proof, there was no case for the jury of murder by the said blows in the head, and an acquittal was directed. *Reg. v. Bird*, 1

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NIGHT POACHING.

In an indictment for night poaching under the statute 9 Geo. 4, c. 69, s. 9, it is unnecessary to state whether the land was open or inclosed.

Where the land was described as in the occupation of Sarah Harriett Williams, and it was proved that she was generally known as "Mrs. Hosier Williams," or as "Sarah Harriett Hosier Williams:"

Held, that as it appeared she would be as well known and identified by the name of Sarah Harriett Williams, and could not be mistaken for any other person, the description in the indictment was sufficient. *Reg. v. Morris*, 205

The gamekeeper of a person who has merely the right of shooting over land is not justified in apprehending a person unlawfully being upon such land by night, for the purpose of taking game. *Reg. v. Price*, 277

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NUISANCE.

Indictment for burning arsenic, whereby noisome and unwholesome smells did arise, so that the air was greatly corrupted. *Evi-*

dence that cattle and trees in the neighbourhood were poisoned by the particles of white arsenic which fell on the ground from the noisome vapour:

Held, admissible, though the white arsenic itself was free from smell. *Reg. v. Garland*, 165

Upon an indictment for nuisance, charging the defendant with refusing and neglecting to bury the body of his child, it was proved that the defendant was a pauper, but that the guardians, acting under the orders of the Poor Law Board, had offered him money for the purpose of enabling him to bury his child, upon his signing an undertaking to repay it on demand:

Held, that he was not bound to accept that offer; and could not be convicted of a nuisance. *Reg. v. Vann*, 379

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PERJURY.

The statute 23 Geo. 2, c. 11, s. 1, enacts, that in indictments for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken, averring such court, or person or persons, to have a competent authority to administer the same, &c.

Quære, whether an averment that the judges of assize before whom the oath was alleged to be taken had "sufficient authority" to administer it, is equivalent to an averment that they had "competent authority" for that purpose.

An indictment for perjury, alleged to have been committed on the trial of S. S., averred that the trial took place at the Assizes and General Sessions of the Delivery of the Gaol of our said Lady the Queen for the county of S., holden at, &c., before John Lord Campbell, C.J. of

our said Lady the Queen, assigned to hold pleas before the Queen herself, and Sir B. V. Williams, Knt., one of the justices of our said Lady the Queen, of her Court of Common Pleas, assigned to deliver the said gaol of the prisoners therein being. It being objected that this was a defective description, as alleging a court with an impossible combination of civil and criminal jurisdiction:

Held, that the word "assizes" might be struck out as surplusage.

It being also objected that the above words "assigned to deliver the said gaol of the prisoners therein being," referred only to the last-named judge:

Held, that the indictment might be amended by the record of the conviction of S. S., by inserting, after the words "Common Pleas," "and others their fellows, justices," assigned to deliver the said gaol, &c.

The record of the conviction of S. S. described the court as a General Session of "Oyerand Terminer and Gaol Delivery." It also described the charge against S. S. as "for cutting and wounding;" the indictment described it as for wounding:

Held, that these variances might also be amended.

Quære, whether the allegation of a trial before two judges, without any allegation or addition of "and others their fellows," is supported by proof of a trial before a Queen's counsel, acting as a Commissioner of Oyer and Terminer, &c., and assisting the judges in that capacity.

Quære also, whether the commissioner not being specifically named in the indictment or in the record of the trial, coupled with the fact that the trial did not take in the Crown Court, renders it necessary to produce the commission or to give any other evidence of the authority of the commissioner, and that he was acting in that capacity.

Semble, that if the trial took place in the Crown Court, no such proof of authority would be required.

The notes of evidence taken by a judge on a trial are not admissible in evidence to prove what was said on that trial. When, therefore, on a trial for perjury, alleged to have been committed by the defendant as a witness on a trial for felony before a Queen's counsel assisting the judges, and his notes of the evidence given on that occasion were tendered (on proof of his handwriting):

Held, that such notes were not admissible. *Reg. v. Child*, 197

An indictment for perjury charged that the defendant, upon a trial for rape, falsely swore that she never got a Mr. M. W. (he the said M. W. being then present in court during the said trial) to write a letter for her; and that averment was prefaced by an allegation, that it was a material question whether she ever got one M. W. to write a letter for her. The evidence proved that, upon the trial for rape, Mr. M. W. was pointed out to her, and that she swore that she did not get him to write for her a letter which was produced and shown to her; and that that was false.

Held, that the allegation of materiality was sufficient; and the identity of M. W. sufficiently shown. *Reg. v. Bennett*, 207.
An arbitrator appointed under s. 77 of 9 & 10 Vict. c. 95, has no authority to administer an oath. *Reg. v. Hallett*, 239

An indictment for perjury averred that on, &c., in the Whitechapel County Court of Middlesex, holden at the court-house in Osborne-house, Whitechapel, in the parish of, &c., in the county of Middlesex, before J. M., serjeant-at-law, then and there being judge of the said court, a certain action or contract then pending in the said County Court between A. L., suing as widow and executrix of H. L., plaintiff, and R. H. defendant, came on to be tried, and was then in due form of law tried and heard before the said J. M., &c., upon which trial the said A. L. &c., tendered herself as a witness on her own behalf, and was duly sworn, &c., before the said J. M., then and there being judge of the said court as aforesaid, and then and there having sufficient and competent authority to administer the said oath to her, &c.:

Held, after verdict upon writ of error, first, that the court was sufficiently designated as a court held under stat. 9 & 10 Vict. c. 95; and secondly, that although there was no express averment that the oath was administered in a judicial proceeding over which the court had jurisdiction, that averment was by necessary intendment involved in the allegation, that the judge had sufficient authority to administer the said oath. *Lavey v. The Queen*, 269

In an action of ejectment brought to recover leasehold premises the lessor of the plaintiff claimed title under C. J., the widow of W. J. W. J. held under a lease made to himself and R. M. jointly, R. M. being the survivor, and a surrender or conveyance from R. M. to C. J. being presumed. On the trial a copy of the will of W. J. was produced, and P., the attorney for the

lessor of the plaintiff, swore that he had examined it with the original will, and also with the act of probate book. The evidence was objected to, and was ultimately withdrawn, the death of W. J. being proved *aliunde*, and admitted, the contents of the will having no bearing on the case, W. J. having no power to devise the property claimed:

Quære, whether the examination of the copy will, as sworn by P., was material to the issue, so as to support an indictment for perjury.

On the trial of the action of ejectment, notes of P.'s evidence were taken by counsel on behalf of the defendant, and handed to his attorney who was present and read them:

Held, that the latter might look at these notes and refresh his memory by them, in giving evidence as to what P. swore on the trial of action of ejectment.

Held, also, that a notice to P. to produce the copy will was sufficient to let in secondary evidence of the contents of that copy, the document having been produced by him at the trial of the action. *Reg. v. Philpotts*, 331

Upon the trial of an ejectment, the title of the lessor of the plaintiff depended upon the fact that M. survived J. The will of J. was irrelevant to the title, but proof of the probate was relevant with reference to the time of J.'s death. A copy of the will of J. was tendered in evidence, and, on objection being made, the plaintiff's attorney falsely swore that he had examined the copy with the original, in the registry at Llandaff; and, upon further objection that the probate ought to be produced, or the act-book proved, he further falsely swore that he had examined the memorandum at the foot of the copy with the entry in the act-book. The judge then offered to receive the document, but the counsel withdrew it. The memorandum was, in fact, a copy of an entry in a book called the "Act-book," but not a copy of the act of probate, so that the evidence, if true, would not have rendered the document legally admissible:

Held, nevertheless, that the attorney had sworn falsely in a judicial proceeding upon a material point, and was guilty of perjury. *Reg. v. Philpotts*, 363

An indictment for perjury alleged that the defendant falsely swore that only one quarter's rent was due from him to his landlord in June, 1851. The landlord (the prosecutor) swore that five quarters' rent was due at that time, and to corroborate

his testimony, his son swore that in August, 1850, the defendant admitted to him that three or four quarter's rent was then due :

Held, that the evidence of the son being consistent with the defendant's statement, as well as with that of the prosecutor, was not sufficient corroboration of the latter to justify a conviction. *Reg. v. Boulter*, 543
A defendant was indicted at the Central Criminal Court for perjury, committed on the trial of W. D., at a previous session of the same court. To prove the trial of W. D., an officer from the Central Criminal Court produced from the office of the clerk of the court the indictment upon which W. D. was tried, and which had upon the face of it words denoting that W. D. had surrendered, pleaded, been found guilty, and sentenced. He also produced the minute book of the court, in which, together with an abstract of the indictment, such particulars were shortly entered :

Held, that such evidence was sufficient proof of the trial, and that it was not necessary to produce any record or certificate of the trial of W. D. *Reg. v. Newman*, 547
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POST OFFICE.

A. brought a letter, inclosing a 10*l.* note, to a district receiving-house, and desired that it might be registered. The postmistress took the money for the registration, and, being busy at the time, requested A. to call again. In the meantime she put the letter under a glass case, to which the prisoner had access. When the letter was taken up, for the purpose of being despatched, it was found that the note had been abstracted :

Held, that the letter was a post letter, within 1 Vict. c. 36, s. 47. *Reg. v. Rogers*, 293

PRACTICE.

An application under the stat. 7 Geo. 4, c. 64, s. 25, which authorises the court to order

compensation, in certain cases, to persons who shall appear to the court to have been active in or towards the apprehension of offenders, must be founded on an affidavit of the amount actually expended. *Reg. v. Haines*, 114

The prisoner having been arrested on a charge of poisoning S. P., a magistrate (the prisoner being kept in custody outside), first took down in writing the depositions of S. P., and then swore him to the truth of it; the prisoner being then brought into the room, he (the magistrate) slowly read over the deposition to S. P., and asked him if it was true, "and having been answered in the affirmative, he then reswore S. P. to his deposition in the presence of the prisoner, and read over the information of S. P. to him," and while he was reading it the prisoner asked him to stop at some statement contained in it; but he told the prisoner that he had better read it over to the end, and that he would then read the deposition paragraph by paragraph distinctly to him, and that he could then put any question he wished to S. P. upon each paragraph; the magistrate accordingly so read over the deposition to the prisoner, who put several questions to the deponent which, with the answers of the latter thereto, were at the time reduced to writing and annexed to the deposition. The deponent having died, the entire document was read in evidence on the part of the Crown at the trial of the prisoner.

Held (Torrens, J., *dissentiente*, and Pennefather, B., *dubitante*), that the evidence was improperly received, inasmuch as it did not sufficiently appear from the facts above stated that the answers to the prisoner's questions had been given by the deceased under the sanction of an oath.

Monahan, C.J., and Perrin, J., further holding (Torrens, J., and Pennefather, B., *dissentientibus*, and Ball, J., *dubitante*) that the evidence was inadmissible both because the information was originally taken down without an oath having been previously administered to the informant, and also because the prisoner was not present from the commencement.

The case of *E. v. Smith* (2 Stark. N. P. C. 210) commented on. *Reg. v. Walsh*, 115
A person residing in a house broken into by burglars, and who, by fastening them in a room, detains them there until assistance is obtained, and the capture of the offenders effected, is within the meaning of the statute 7 Geo. 4, c. 64, s. 28, which enables the court to order payment by

way of compensation to any person who appears to have been active in the apprehension of offenders. *Reg. v. Dunning*, 142
The court may properly request counsel to give his honorary services to a prisoner.

Aliter, with an attorney.

But the court will recommend that, in such cases, the Crown shall pay the fees both of counsel and attorney as assigned.

Reg. v. Fogarty, 161

The counsel for a prisoner, on cross-examining a witness for the prosecution, is not entitled to put the deposition of the witness into his hand, for the purpose of refreshing his memory, without giving it in evidence.

Reg. v. Ford, 184

The deposition of a witness who is prevented from attending by illness may be used before the grand jury as well as the petty jury.

Quære, whether this court has any jurisdiction to decide such a question; and whether the improper reception in evidence of a deposition before the grand jury would invalidate a conviction. *Reg. v. Clements*, 191

Where a prisoner pleaded guilty to several indictments charging him with larceny, and an application was made on the part of the prosecutor for an order for restitution, the court consented to hear counsel on behalf of those who were in possession of the goods, and against whom the order, if made, would operate.

Where, under such circumstances, the depositions taken before the magistrate disclosed a clear case of felony, the court declined to order a writ of restitution to issue on the suggestion of the holders of the goods that the prisoner was an agent, and therefore that the fraudulent dealing with the goods on his part did not constitute a felony, but they made the common order for restitution. *Reg. v. Macklin*, 216

It is an improper practice for counsel for the prosecution to make any comment by way of reproach upon the fact that the witnesses whom the prisoner produces were not examined before the magistrates.

Where a prisoner was clearly spoken to by one or more as the person by whom the crime was committed, it is the duty of the magistrate to commit, and therefore it would be useless to call witnesses then to prove an *alibi* or anything else in his favour. *Reg. v. Clark*, 230

The practice of placing his deposition in the hands of a witness on cross-examination, and asking him if, having read it, he still persists in his statement, is wrong in principle, and will not be permitted.

The proper course is to put the deposition

in evidence, for the purpose of contradicting the witness. *Reg. v. Palmer*, 236

The 9th section of Lord Campbell's Criminal Offences Act 14 Vict. c. 19, prohibits a previous conviction being given in evidence, or stated to the jury, until after a verdict of guilty of the subsequent offence.

Held, by Alderson, B., after consultation with Jervis, C.J., that the old practice should still be pursued, of calling upon the prisoner to plead to the whole charge against him, including the previous convictions, but that when given in charge to the jury, that portion of the indictment alleging a former conviction should be omitted. *Anonymous*, 268

Where an indictment for a misdemeanour has been removed by *certiorari*, and the defendants having entered into recognizances to appear and try the indictment, the prosecutor has a right to enter it for trial, and whichever party enters it for trial has a right to try it in his turn, as in that respect an indictment so removed has all the incidents of a civil action. Where, therefore, there were two indictments for conspiracy arising out of the same transactions, one against D. and others, and the other against R. and others, and they were entered by the prosecutor in that order, numbers "2" and "3" in the cause list, and the defendants subsequently entered the cases as numbers "10" and "13" in the list, placing the prosecution against R. and others first:

Held, that the prosecutor had the right of trying the indictments in the order entered by him. *Reg. v. Duffield*, 286

Where a prisoner states in his affidavit for postponement of his trial that, in consequence of the harshness of the governor of the gaol in which he is confined in refusing to allow him pens, ink, or paper, whereby to communicate with his friends and prepare for his trial, he cannot procure witnesses whose names are given in the affidavit, and who are also stated to be necessary for his defence, the court will grant a postponement. The court will not entertain complaints of favouritism, or harsh or improper conduct against the governor or other prison officials. The Court of Queen's Bench, or Board of Superintendence, is the proper tribunal to investigate such a charge. *Reg. v. Walker*, 320

On the traverse of an inquisition *de lunatico inquirendo*, the traverse alleging that the traverser is of sound mind, and the replication denies that allegation, and concludes to the country, and issue is thereupon joined, the traverser has a right to begin. *Reg. v. Loveday*, 343

When an indictment charges a previous conviction, the proper course is to arraign the prisoner upon the whole indictment, and, if he plead not guilty, then to swear the jury, and to charge them in the first instance to inquire only as to the subsequent offence, reading to them only that part of the indictment, unless evidence of character should be given on the part of the prisoner; but after he has been convicted of that subsequent offence, then, without reswearing them, to read the other part of the indictment to the jury, and charge them to inquire as to the previous conviction. *Reg. v. Shuttleworth*, 369

In the case of several defendants, who are separately defended by counsel, the right of cross-examination, and of addressing the jury, follows the order of the defendants in the indictment, and not the rank or seniority of the counsel. *Reg. v. Rowlands*, 436

When counsel for the prisoner requires the production of a bundle of articles not produced for the purposes of the prosecution, but which he conceives necessary before proceeding to cross-examine, the court will order the articles to be produced.

No matter with what *bona fides* a pawn-broker may have acted in advancing money on stolen goods, the court will not order the owner of the goods, after convicting prisoner, to pay the whole or any part of the sums so advanced. *Reg. v. Sargent*, 499

Where a prisoner is confined in a gaol at a distance from the court-house, so that he cannot be put forward without too great a delay, the court will authorise the magistrates to take what they may consider sufficient bail. *Reg. v. Walker*, 500

When the trial of a prisoner, who has been indicted for a capital offence is postponed by the judge of assize on an application by the Crown, and such prisoner is ordered to remain in custody, this court, where the Crown counsel object, will not permit such prisoner to stand out on bail, no matter how strong a case may be made, or what amount of bail the prisoner is prepared to give. *Reg. v. Magennis*, 511

Depositions taken before a coroner are within the stat. 6 & 7 Will. 4, c. 114, s. 3, which requires copies of depositions to be furnished on application to prisoners, at the rate of charge therein provided; and a coroner who demands more is guilty of extortion in his office. *Reg. v. White*, 562

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A girl of sixteen years of age is not an infant of tender years, and therefore her master and mistress, who have not kept her under duress, are not guilty of a misdemeanor in not supplying her with sufficient food and nourishment, whilst in their service. *Reg. v. S—— and wife*, 279

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THREATS.

On the trial of an indictment for threatening to accuse the prosecutor of an infamous crime with intent to extort money, it was proved that the prisoner had gone up to the prosecutor and said to him, "If you do not give me a sovereign I will charge you with an indecent assault."

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